DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 10-1195
Title: Marcus D. Mims, Petitioner
v.
Arrow Financial Services, LLC
Docketed: April 1, 2011
Linked with 10A816
Lower Ct: United States Court of Appeals for the Eleventh Circuit
Case Nos.: (10-12077)
Decision Date: November 30, 2010
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
Feb 15 2011	Application (10A816) to extend the time to file a petition for a writ of certiorari from February 28, 2011 to March 30, 2011, submitted to Justice Thomas.
Feb 22 2011	Application (10A816) granted by Justice Thomas extending the time to file until March 30, 2011.
Mar 30 2011	Petition for a writ of certiorari filed. (Response due May 2, 2011)
Apr 26 2011	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioner.
Apr 26 2011	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the respondent.
Apr 28 2011	Order extending time to file response to petition to and including May 27, 2011.
May 2 2011	Brief amici curiae of National Consumer Law Center, et al. filed.
May 27 2011	Brief of respondent Arrow Financial Services, LLC in opposition filed.
Jun 7 2011	DISTRIBUTED for Conference of June 23, 2011.
Jun 7 2011	Reply of petitioner Marcus D. Mims filed. (Distributed)
Jun 27 2011	Petition GRANTED.
Jul 8 2011	The time to file the joint appendix and petitioner's brief on the merits is extended to and including September 13, 2011.
Jul 8 2011	The time to file respondent's brief on the merits is extended to and including October 27, 2011.
Sep 9 2011	Consent to the filing of amicus curiae briefs in support of either party or of neither party received from counsel for the respondent.
Sep 12 2011	SET FOR ARGUMENT ON Monday November 28, 2011
Sep 13 2011	Joint appendix filed. (Statement of costs filed)
Sep 13 2011	Brief of petitioner Marcus D. Mims filed.
Sep 19 2011	CIRCULATED

Sep 23 2011	Record received from U.S.C.A. for 11th Circuit. (1 envelope)
Oct 3 2011	Record received from U.S.D.C. for Southern District of Florida. (1 envelope)
Oct 21 2011	Brief of respondent Arrow Financial Services, LLC filed. (Distributed).
Oct 26 2011	Consent to the filing of amicus curiae briefs in support of the respondent received from counsel for the petitioner.
Oct 26 2011	Consent to the filing of amicus curiae briefs in support of the respondent received from counsel for the petitioner.
Oct 27 2011	Brief amicus curiae of DBA International filed. (Distributed)
Oct 28 2011	Brief amicus curiae of ACA International filed. (Distributed)
Oct 28 2011	Brief amicus curiae of National Federation of Independent Business Small Business Legal Center filed. (Distributed)
Nov 17 2011	Reply of petitioner Marcus D. Mims filed. (Distributed)
Nov 28 2011	Argued. For petitioner: Scott L. Nelson, Washington, D. C. For respondent: Gregory G. Garre, Washington, D. C.
Jan 18 2012	Judgment REVERSED and case REMANDED. Ginsburg, J., delivered the opinion for a unanimous Court.
Feb 21 2012	JUDGMENT ISSUED.
Feb 28 2012	Record returned to U.S.C.A. for 11th Circuit.
Feb 28 2012	Record returned to U.S.D.C. for Southern District of Florida.

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.

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No.

IN THE

Supreme Court of the United States

MARCUS D. MIMS,

Petitioner,

v.

ARROW FINANCIAL SERVICES, LLC,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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March 2011

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QUESTION PRESENTED

Did Congress divest the federal district courts of their federal-question jurisdiction under 28 U.S.C. § 1331 over private actions brought under the Telephone Consumer Protection Act?

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INTRODUCTION

Every law student learns in first-year civil procedure that 28 U.S.C. § 1331 gives the federal district courts jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States." Although the precise scope of federal-question jurisdiction has proved notoriously elusive, Justice Holmes's test remains the most familiar: "A suit arises under the law that creates the cause of action." Federal-question jurisdiction thus exists over a cause of action created by federal law unless Congress provides otherwise.

The circuits are intractably divided over whether federal-question jurisdiction exists over a cause of action created by a particular federal law: the Telephone Consumer Protection Act of 1991 (TCPA). The TCPA, without stating that it limits the jurisdiction of the federal courts, provides that a victim of telemarketing abuse "may" bring a civil action to enforce the Act in state court. Based on that provision, and the Act's sparse legislative history, six circuits have concluded that Congress intended to give state courts exclusive jurisdiction.

By contrast, recent decisions by Judge Easterbrook of the Seventh Circuit and Judge Sutton of the Sixth Circuit have thoughtfully considered the same jurisdictional question and rejected that majority approach—as did then-Judge Alito in dissent when he was sitting on the Third Circuit. These opinions recognize that a statutory provision allowing the state courts to entertain claims cannot, by itself, divest the federal courts of the subject-matter jurisdiction that they otherwise possess under § 1331, and that the six circuits' contrary view is at odds with several of this Court's precedents.

The entrenched 6-to-2 split among the circuits on this important and recurring question of federal jurisdiction has generated needless satellite litigation, sown confusion over fundamental jurisdictional principles, and frustrated Congress's goal of a nationally uniform solution to the problem of interstate telemarketing abuse. This case presents an ideal vehicle to resolve the conflict, which will not resolve itself absent this Court's intervention. The Court should therefore grant the petition and establish a uniform jurisdictional rule.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Eleventh Circuit is unreported and is reproduced in the appendix at 1a. The decision of the United States District Court for the Southern District of Florida is unreported and is reproduced in the appendix at 4a.

JURISDICTION

The court of appeals entered its judgment on November 30, 2010. On February 22, 2011, Justice Thomas granted a timely request for an extension of time, to and including March 31, 2011, to file a petition for a writ of certiorari. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

28 U.S.C. § 1331 provides:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

47 U.S.C. § 227(b)(3) provides, in relevant part:

> Private right of action

> A person or entity may, if otherwise permitted by the laws of a court of a State, bring in an appropriate court of that State—
>
> (A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation
>
> (B) an action to recover for actual monetary loss from such a violation, or to receive $500 in damages for each such violation, whichever is greater, or
>
> (C) both such actions.

47 U.S.C. § 227(f)(2) provides, in relevant part:

> Exclusive jurisdiction of Federal Courts
>
> The district courts of the United States ... shall have exclusive jurisdiction over all civil actions brought [by state attorneys general or designated state officials or agencies].

STATEMENT

1. In 1991, Congress responded to consumers' "outrage over the proliferation of intrusive, nuisance calls to their homes from telemarketers." 47 U.S.C. § 227 note. Although over half the states had laws addressing the problem, telemarketers could "evade their prohibitions through interstate operation." *Id.* Congress therefore concluded that a "Federal law is needed to control residential telemarketing practices." *Id.*; *see also* S. Rep. No. 102-178, at 3, *reprinted in* 1991 U.S.C.C.A.N. 1968, 1970.

The result was the Telephone Consumer Protection Act of 1991 (TCPA), enacted as an amendment to the Communications Act of 1934. Pub. L. No. 102-243, § 3(a), 105 Stat. 2395 (codified at 47 U.S.C. § 227). Among other

things, the TCPA prohibits certain unsolicited marketing calls, restricts the use of automatic dialers or prerecorded messages, and delegates rulemaking authority to the Federal Communications Commission (FCC). 47 U.S.C. §§ 227(b)(1)(A), (b)(2). The Act may be enforced through civil suits brought by state attorneys general or private citizens. 47 U.S.C. §§ 227(b)(3), 227(f)(1). In either type of suit, the plaintiff may obtain injunctive relief, actual damages, or statutory damages of $500 per violation.

The TCPA confers on the federal district courts "exclusive jurisdiction over all civil actions" brought by state attorneys general. 47 U.S.C. § 227(f)(2). There is no parallel exclusive-jurisdiction provision for private suits. Instead, the TCPA provides that private citizens "may, if otherwise permitted by the laws or rules of court of a State, bring [an action] in an appropriate court of that State." 47 U.S.C. § 227(b)(3).

2. Respondent Arrow Financial Services is a subsidiary of Sallie Mae, an originator, servicer, and collector of private student loans. Petitioner Marcus Mims alleges that Arrow harassed him by repeatedly making collection calls to his cellular phone using an automatic dialing system and leaving prerecorded voicemail messages on that phone, in violation of the TCPA, 47 U.S.C. § 227(b)(1)(A)(iii).[1]

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[1] The FCC has made clear in a declaratory ruling that calls to consumers' wireless phones for collection purposes violate the TCPA unless the phone number "was provided by the consumer to the creditor." *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Request of ACA International for Clarification and Declaratory Ruling*, 23 FCC Rec. 559, 564-65 (2008). The FCC emphasized that prere-

(*Footnote continued*)

Mims sued Arrow in federal district court. After the parties settled Mims' non-TCPA claims, the district court granted Arrow's motion to dismiss. Relying on *Nicholson v. Hooters of Augusta, Inc.*, 136 F.3d 1287, 1289 (11th Cir. 1998), *modified*, 140 F.3d 898 (11th Cir. 1998), the district court ruled that "federal question jurisdiction under § 1331 is unavailable because Congress vested jurisdiction over the TCPA exclusively in state court." Pet. App. 5a.

The Eleventh Circuit affirmed. Finding itself bound by *Nicholson*'s 1998 holding that federal courts lack federal-question jurisdiction over private TCPA actions, the court declined to consider later cases from other circuits or this Court. *Id.* 2a. The court explained that the Seventh Circuit's contrary opinion in *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446 (7th Cir. 2005), "does not overturn our precedent" and that this Court's decisions interpreting 28 U.S.C. § 1331 in *Grable & Sons Metal Prods., Inc. v. Darue Eng'g*, 545 U.S. 308 (2005), and *Breuer v. Jim's Concrete of Brevard, Inc.*, 538 U.S. 691 (2003), are not "clearly on point." Pet. App. 2a.

One month after the Eleventh Circuit's decision, the Sixth Circuit joined the Seventh Circuit in reaching the contrary conclusion—that district courts *do* have federal-question jurisdiction over private TCPA actions. *See Charvat v. Echostar Satellite LLC*, 630 F.3d 459, 463-64 (6th Cir. 2010).

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corded calls could be particularly costly to cellular subscribers who pay for incoming calls. *Id.* at 562, 565.

REASONS FOR GRANTING THE PETITION

I. The Circuits Are Intractably Divided Over Whether Congress Divested the District Courts of Federal-Question Jurisdiction.

Six courts of appeals—the Second, Third, Fourth, Fifth, Ninth, and Eleventh—have held that federal courts lack federal-question jurisdiction over private TCPA actions. *See Int'l Sci. & Tech. Inst., Inc. v. Inacom Commc'ns, Inc.*, 106 F.3d 1146, 1158 (4th Cir. 1997); *Chair King, Inc. v. Houston Cellular Corp.*, 131 F.3d 507, 514 (5th Cir. 1997); *Nicholson*, 136 F.3d at 1289; *Foxhall Realty Law Offices, Inc. v. Telecomms. Premium Servs., Ltd.*, 156 F.3d 432, 435 (2d Cir. 1998); *ErieNet, Inc. v. Velocity Net, Inc.*, 156 F.3d 513, 519 (3d Cir. 1998); *Murphey v. Lanier*, 204 F.3d 911, 915 (9th Cir. 2000). These circuits have concluded that the TCPA's provision permitting actions to be brought in state courts of competent jurisdiction—which provides that a person "may" bring an action in state court if otherwise permitted by state law, 47 U.S.C. § 227(b)(3)—creates exclusive state-court jurisdiction and effectively divests the federal courts of federal-question jurisdiction under 28 U.S.C. § 1331.

By contrast, the two circuits that have most recently confronted the question on a blank slate—the Sixth and Seventh—have conclusively rejected that majority view. *See Charvat*, 630 F.3d at 463-64 (Sutton, J.); *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 450-51 (7th Cir. 2005) (Easterbrook, J., joined by Posner and Rovner, J.J.). In addition, then-Judge Alito, dissenting from the Third Circuit's decision in *ErieNet*, concluded that "it is clear that the language of the TCPA is insufficient to divest district courts of their federal question jurisdiction." 156 F.3d at 521.

In the three regional circuits that have yet to confront the question presented—the First, Eighth, and Tenth—the district courts have recognized the circuit split and developed intra-circuit splits of their own.[2] Even the scholarly commentary is split, with law review articles advocating both positions.[3]

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[2] *See, e.g., Holster v. BNA Subsidiaries, LLC*, 2010 WL 902699, at *1 (D.N.H. 2010) ("There is a split of authority among the courts of appeals that have considered whether there is federal question jurisdiction over private TCPA claims. ... [T]he Seventh Circuit's view is the most persuasive."); *Carnes v. IndyMac Mortg. Servs.*, 2010 WL 5276987, at *4-*5 (D. Minn. 2010) (observing that the "Circuits are split on whether federal-question jurisdiction exists over TCPA claims by individuals, and the Eighth Circuit has not yet addressed the issue," and following Seventh Circuit's approach); *Percic Enters., Inc. v. European Autoworks, Inc.*, 2010 WL 2133563, at *2 (D. Minn. 2010) (observing that "there does not appear to be an Eighth Circuit decision on point" and concluding that "while the TCPA is a federal law, the specific jurisdictional provision in § 227(b)(3) calls for private actions to be brought in state courts"); *Fun Servs. of Kansas City, Inc. v. Hertz Equip. Rental Corp.*, 2008 WL 341475, at *3 (D. Kan. 2008) ("[T]he court finds that it does not have federal question jurisdiction over plaintiff's TCPA claim."); *Consumer Crusade, Inc. v. Scientific Research Group, Inc.*, 2005 WL 2064403, at *1 (D. Colo. 2005) ("[T]he 'conundrum' of federal subject matter jurisdiction under the TCPA should be resolved against finding such jurisdiction.").

[3] *Compare* Gonell, *Statutory Interpretation of Federal Jurisdictional Statutes: Jurisdiction of the Private Right of Action Under the TCPA*, 66 FORDHAM L. REV. 1895, 1898 (1998) (arguing that "jurisdictional language merely permitting state court jurisdiction, such as that in the TCPA, should not divest federal courts of § 1331 jurisdiction absent clearly expressed congressional intent to repeal") *with* Tharp, *Federal Court Jurisdiction Over Private TCPA Claims: Why the Federal Courts of Appeals Got It Right*, 52 FED. COMM. L.J. 189, 192 (1999) (arguing that the TCPA "requires that state courts exercise exclusive jurisdiction" over private actions).

The conflict over the question presented has also generated confusion over whether the TCPA divests the district courts of diversity jurisdiction under 28 U.S.C. § 1332. The Second, Seventh, and Tenth Circuits have each "rejected extension of the reasoning from the TCPA federal question cases to TCPA diversity cases." *US Fax Law Ctr. Inc. v. iHire*, 476 F.3d 1112, 1116 (10th Cir. 2007). These courts hold that, "absent an explicit indication that Congress intended to create an exception to diversity jurisdiction, one may not be created by implication." *Id.* at 1117; *see Gottlieb v. Carnival Corp.*, 436 F.3d 335, 338 (2d Cir. 2006) (Sotomayor, J.); *Brill*, 427 F.3d at 450. "But," as the Sixth and Seventh Circuits have pointed out, "if state jurisdiction really is 'exclusive,' then it knocks out § 1332 as well as § 1331." *Id.*; *see also Charvat*, 630 F.3d at 464; *Bonime v. Avaya, Inc.*, 547 F.3d 497, 502 (2d Cir. 2008) (Calabresi, J. concurring) (suggesting that the two lines of cases are not easily reconciled). As then-Judge Sotomayor observed, "Congress's explicit investiture of 'exclusive jurisdiction' in the federal courts in § 227(f)(2) indicates that in § 227(b)(3), which does not include such language, Congress did not similarly vest categorical, 'exclusive' jurisdiction in state courts for private TCPA claims, and therefore did not divest federal courts of both federal question and diversity jurisdiction." *Gottlieb*, 436 F.3d at 338.

More fundamentally, the circuit split on the question presented reveals the lower courts' "dizzying uncertainty" about an elementary inquiry in the law of federal jurisdiction: "where Congress explicitly grants state courts jurisdiction, are federal courts also presumed to possess jurisdiction?" LITTLE, FEDERAL COURTS: EXAMPLES & EXPLANATIONS 224-25 (2006). The circuit split demonstrates that "the lower courts are in

disagreement" over that analytical problem, which this Court has never squarely addressed. *Id.* (discussing TCPA cases); *compare Int'l Science*, 106 F.3d at 1151-52; *with ErieNet*, 156 F.3d at 521 (Alito, J., dissenting).

Certiorari is warranted because the division among the circuits over federal-question jurisdiction for private TCPA claims is considered and entrenched. The Sixth and Seventh Circuits have considered and rejected the views of the Second, Third, Fourth, Fifth, Ninth, and Eleventh Circuits. There is no reason to believe that those six circuits will reconsider their position, to which they have adhered for more than a decade. As a result, it is unlikely that the conflict will be resolved absent this Court's intervention.

II. The Question Presented Is a Recurring Issue of National Importance, and This Case Is an Ideal Vehicle for Resolving It.

1. When it enacted the TCPA in 1991, Congress found that "[m]ore than 300,000 solicitors call more than 18,000,000 Americans every day." 47 U.S.C. § 227 note. By 2003, the number of daily calls had "increased five fold (to an estimated 104 million), due in part to the use of new technologies, such as predictive dialers." *Rules and Regulations Implementing the Telephone Consumer Protection Act (TCPA) of 1991*, 68 Fed. Reg. 44144, 44152 (2003). That high volume of calls translates into a high volume of litigation over telemarketing abuses. The question presented arises with staggering frequency in cases across the country.[4]

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[4] *See, e.g., Fenza's Auto, Inc. v. Montagnaro's, Inc.*, 2011 WL 1098993 (D.N.J. 2011); *Vigus v. S. Ill. Riverboat/Casino Cruises, Inc.*, 2011 WL 884092 (S.D. Ill. 2011); *Harmon v. Gulf Coast*

(*Footnote continued*)

"The volume of these lawsuits heightens the risk that individuals and companies will be subject to decisions pointing in opposite directions." *Charvat*, 630 F.3d at 466. The "possibility of conflicting decisions in different state and federal jurisdictions" is particularly onerous for telemarketers, who "generally peddle their services nationally." *Id.* At the same time, "[h]ow this split plays out in the federal courts is important for consumers bringing TCPA claims." Eddings, *Seventh Circuit Splits from Sister Circuits Over Telephone Consumer Protection Act*, 18 LOY. CONSUMER L. REV. 257, 266 (2005).

Absent intervention by this Court, access to a federal forum will turn on accidents of geography. Consumers and businesses in Ohio can go to federal court, while

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Collection Bureau, Inc., 2011 WL 777960 (S.D. Fla. 2011); *Hawk Valley, Inc. v. Taylor*, 2011 WL 710466 (E.D. Pa. 2011); *Spillman v. Dominos Pizza, LLC*, 2011 WL 721498 (M.D. La. 2011); *A & L Indus., Inc. v. CDM Tech. Training Inst., Inc.*, 2011 WL 900132 (D.N.J. 2011); *Burdge v. Ass'n Health Care Mgmt., Inc.*, 2011 WL 379159 (S.D. Ohio 2011); *Nack v. Walburg*, 2011 WL 310249 (E.D. Mo. 2011); *Ortega v. Collectors Training Inst. of Ill.*, Inc., 2011 WL 241948 (S.D. Fla. 2011); *Hall v. W.S. Badcock Corp.*, 2010 WL 5137832 (M.D. Fla. 2010); *Watts v. Enhanced Recovery Corp.*, 2010 WL 3448508 (N.D. Cal. 2010); *Am. Copper & Brass, Inc. v. Lake City Indus. Prods., Inc.*, 2010 WL 2998472 (W.D. Mich. 2010); *Imhoff Inv., L.L.C. v. Alfoccino of Auburn Hills*, 2010 WL 2772495 (E.D. Mich. 2010); *Percic Enters.*, 2010 WL 2133563, *report and recommendation adopted*, 2010 WL 2133236 (D. Minn. 2010); *Radha Geismann, M.D. v. Byram Healthcare Centers, Inc.*, 2010 WL 1930060 (E.D. Mo. 2010); *Bridging Cmtys., Inc. v. Top Flite Fin., Inc.*, 2010 WL 1790357 (E.D. Mich. 2010); *Charvat v. NMP, LLC*, 703 F. Supp. 2d 735 (S.D. Ohio 2010); *Machesney v. Lar-Bev of Howell*, 2010 WL 821932 (E.D. Mich. 2010); *Raitport v. Harbour Capital Corp.*, 2010 WL 830071 (D.N.H. 2010); *APB Assocs., Inc. v. Bronco's Saloon, Inc.*, 2010 WL 822195 (E.D. Mich. 2010).

their counterparts across the border in Pennsylvania must go to state court. And in states like Missouri and Massachusetts, where the federal circuits have not yet decided the question presented, the conflict will produce needless litigation over jurisdiction at the threshold of virtually every case brought under the TCPA. "Jurisdictional rules"—to prevent such uncertainty and waste—"should be clear." *Grable*, 545 U.S. at 321 (Thomas, J., concurring).

The jurisdictional conflict will inevitably produce conflicts on a range of questions of substantive law under the TCPA. In the six circuits that have rejected federal-question jurisdiction, interpretation of the TCPA's private civil remedies—even in large class-actions or injunctive-relief suits with potentially sweeping consequences—will be left to the state courts. That state of affairs will inevitably "increase disunity in standards and decisions in implementing a nationwide law." Eddings, 18 LOY. CONSUMER L. REV. at 266.

Worse still, in the six circuits that reject federal-question jurisdiction, the states may be able to limit or cut off private enforcement altogether. These circuits acknowledge the possibility "a state could decide to prevent its courts from hearing private actions to enforce the TCPA's substantive rights," and thus the very "existence of a private right of action under the TCPA could vary from state to state." *Int'l Science*, 106 F.3d at 1156; *see Murphey* 204 F.3d at 1156; *Brill*, 427 F.3d at 451 ("[W]here would victims go if a state elected not to entertain these suits?").[5]

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[5] This scenario is not merely hypothetical: Some state courts, for example, have rejected private TCPA actions on the ground that

(*Footnote continued*)

2. This case cleanly presents the question whether Congress has divested the district courts of federal-question jurisdiction over private TCPA actions. The case is an ideal vehicle to resolve that question because the question is both squarely raised by, and outcome determinative of, this case. It is undisputed that this case arises under the TCPA and that no basis for jurisdiction other than federal-question jurisdiction is available. And the underlying facts are not at issue. The district court and court of appeals decisions both hinged solely on whether federal-question jurisdiction exists over private TCPA claims.

The time is ripe for this Court to resolve the circuit split. With eight of the eleven regional circuits having weighed in, there is no need to await further deliberation in the lower courts. If the Court does not grant review in this case, it risks being unable to address the issue for lack of another good vehicle. The time for review of the Sixth Circuit's decision in *Charvat* has passed, and the eight circuits that have decided the question are unlikely to revisit it. Litigants in the six circuits forecelosing jurisdiction are unlikely to appeal and, if represented by knowledgeable counsel, are unlikely to bring cases in (or remove them to) federal court. This Court should grant certiorari in this case to establish a predictable jurisdictional regime for resolving the large number of private actions under the TCPA.

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they were not expressly "authorized" by state law. *See Autoflex Leasing, Inc. v. Mfrs. Auto Leasing, Inc.*, 16 S.W.3d 815, 817 (Tex. App. 2000); *R.A. Ponte Architects, Ltd. v. Investors' Alert, Inc.*, 815 A.2d 816, 816 (Md. Ct. Spec. App. 2003).

III. The Decision Below Is Wrong and Cannot Be Reconciled With This Court's Cases.

Certiorari is also warranted because the majority approach, adopted by six circuits and applied below, is wrong on the merits and at odds with this Court's cases. Congress has not divested the district courts of federal-question jurisdiction over private TCPA actions.

First, the majority approach cannot be reconciled with the text or history of the federal-question jurisdiction statute, 28 U.S.C. § 1331, which since 1875 has given federal district courts original jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States." Although this language "has resisted all attempts to frame a single, precise definition," the "most familiar definition of the statutory 'arising under' limitation is Justice Holmes's statement, 'A suit arises under the law that creates the cause of action.'" *Franchise Tax Bd. of Calif. v. Constr. Laborers Vacation Trust for S. Calif.*, 463 U.S. 1, 8-9 (1983) (quoting *Am. Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916)).

As a principle of inclusion, Holmes's definition has not seriously been challenged in the 95 years since it was announced. *See* Gonell, 66 FORDHAM L. REV. at 1927; HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 782 (6th ed. 2009); CHEMERINSKY, FEDERAL JURISDICTION 288 (5th ed. 2007) ("There is little dispute that there is federal question jurisdiction if a plaintiff's complaint states a claim under a federal law that provides a legal entitlement to a remedy."). Indeed, since Holmes's statement, no court had held that Congress created a cause of action outside the statutory

grant of federal-question jurisdiction until the Fourth Circuit rejected jurisdiction over TCPA claims in 1997.[6]

Thus, federal-question jurisdiction exists over rights of action created by federal law unless Congress has specifically acted to divest the courts of that jurisdiction. *See Rosencrans v. United States*, 165 U.S. 257, 262 (1897) ("When there are statutes clearly defining the jurisdiction of the courts, the force and effect of such provisions should not be disturbed by a mere implication flowing from subsequent legislation."); *see Gottlieb*, 436 F.3d at 339-340. But the courts that have adopted the majority rule acknowledge that the TCPA "is silent as to federal court jurisdiction" over private actions. *Nicholson*, 136 F.3d at 1288; *see also ErieNet*, 156 F.3d at 521 ("[S]ection 227(b)(3) says nothing about the jurisdiction of the federal district courts.") (Alito, J., dissenting). Given the existence of 28 U.S.C. § 1331, and the absence of any dispute that the right of action under the TCPA is created by federal law, that silence should be the end of the matter.

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[6] The Fourth Circuit relied on *Shoshone Mining Co. v. Rutter*, 177 U.S. 505 (1900), a "problematic (and perhaps anomalous)" exception to the rule that federal causes of action arise under federal law. HART AND WECHSLER at 784; *see Int'l Science*, 106 F.3d at 1154. *Shoshone* rested on two provisions in a federal mining-rights statute—one incorporating local law as the rule of decision, and another requiring an amount in controversy that would not be satisfied by the majority of the small mining claims. Neither rationale applies here: Substantive rights under the TCPA are defined entirely by federal law and Congress removed § 1331's amount-in-controversy requirement in 1980. *See* Gonell, 66 FORDHAM L. REV. at 1928. Whatever its merits, *Shoshone*'s "extremely rare exception to the sufficiency of a federal right of action," *Grable*, 545 U.S. at 317 n.5, is inapplicable.

Second, the majority approach is at odds with the "general rule that the grant of jurisdiction to one court does not, of itself, imply that the jurisdiction is to be exclusive." *United States v. Bank of New York & Trust Co.*, 296 U.S. 463, 479 (1936). This Court adhered to that rule in *Tafflin v. Levitt*, 493 U.S. 455 (1990), which held that the federal RICO statute's grant of jurisdiction to federal district courts does not divest state courts of concurrent jurisdiction over private RICO actions. *See* 18 U.S.C. § 1964 (providing that a person "may sue ... in any appropriate United States district court"). This provision, *Tafflin* reasoned, "is plainly permissive, not mandatory, for the statute does not even suggest that such jurisdiction shall be exclusive. It provides that suits of the kind described 'may' be brought in the federal district courts, not that they must be." 492 U.S. at 460-61 (citation omitted). As Justice Alito and Judge Sutton have explained, *Tafflin*'s reasoning makes it "clear that the language of the TCPA is insufficient to divest district courts of their federal question jurisdiction, as the statute merely provides that suits 'may' be brought in state court." *ErieNet*, 156 F.3d at 521-23 (Alito, J., dissenting); *see Charvat*, 630 F.3d at 464. The majority approach cannot be reconciled with *Tafflin*.

Third, as the Sixth and Seventh Circuits have pointed out, the majority approach is in tension with this Court's decisions in *Breuer*, 538 U.S. 691, and *Grable*, 545 U.S. 308—both of which postdate the decisions of the six circuits that have rejected federal-question jurisdiction. *Breuer* held that a Fair Labor Standards Act provision allowing plaintiffs to "maintain" an action in either state or federal court did not preclude removal because 28 U.S.C. § 1441 allows removal of any claim under federal law "[e]xcept as otherwise expressly provided by Act of Congress." The right to "maintain" an

action in state court, *Breuer* held, was not an "express" prohibition on federal jurisdiction. "One may say exactly the same thing about the right to sue in state court under § 227(b)(3)." *Brill*, 427 F.3d at 450. *Grable* held that federal-question jurisdiction exists (even over state-law claims) where the claims depend on a substantial and disputed federal issue and where exercising jurisdiction would not disturb the congressionally approved balance of state and federal jurisdiction. Those factors favor federal jurisdiction here. *See Charvat*, 630 F.3d at 463.

Fourth, the majority approach draws the wrong inference from the differences in language between § 227(f)(2), which confers "exclusive jurisdiction" on federal courts for state enforcement actions, and § 227(b)(3), which says only that consumers "may" sue in state court. "The most natural interpretation of Congress' failure to use similar language in section 227(b)(3) is that Congress did not intend to grant exclusive jurisdiction in that section." *ErieNet*, 156 F.3d at 522 (Alito, J., dissenting); *see Brill*, 427 F.3d at 451 ("The contrast between § 227(f)(2) and § 227(b)(3) is baffling unless one provides exclusivity and the other doesn't.").

Fifth, the majority approach incorrectly concludes that the TCPA's grant of jurisdiction to state courts is superfluous unless exclusive, because concurrent jurisdiction would be available anyway. *See Testa v. Katt*, 330 U.S. 386 (1947). But that conclusion ignores the other functions served by § 227(b)(3). The provision avoids arguments that *federal* jurisdiction is exclusive. "Such contentions are frequent and may entail decades of litigation across the thirteen circuits." *Brill*, 427 F.3d at 451; *see, e.g., Yellow Freight Sys., Inc. v. Donnelly*, 494 U.S. 820 (1990) (holding, after 26 years of litigation,

that claims under the Civil Rights Act of 1964 may be resolved in state as well as federal courts); *Tafflin*, 493 U.S. 455 (holding, after 20 years of litigation, that claims under RICO may be resolved in state as well as federal courts). And its proviso ("if otherwise permitted by the laws or rules of a court of a State") indicates that the availability of state courts for TCPA claims is contingent on state jurisdictional principles and rules.

Sixth, the majority approach inappropriately relies on an isolated statement in a floor speech by Senator Ernest Hollings, the TCPA's sponsor, as evidence that Congress intended to foreclose federal jurisdiction. *See Int'l Science*, 106 F.3d at 1152-53. But "one speech given by one senator" is insufficient to demonstrate Congress's unmistakable intent. *See ErieNet*, 156 F.3d at 522 (Alito, J., dissenting). In any event, Senator Hollings's statement—that the bill was designed to "*allow* consumers to bring an action in State courts," 137 Cong. Rec. S16205 (daily ed. Nov. 7, 1991) (emphasis added)—fully supports the conclusion that the TCPA's authorization of state-court actions was intended to be permissive rather than mandatory.

For these reasons, the decision below incorrectly decided the question whether Congress divested the federal district courts of federal-question jurisdiction over private TCPA actions. Because the circuits are hopelessly divided over that important question, this Court should grant certiorari to resolve the conflict and correct the decision below.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 2011

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 10-12077
Non-Argument Calendar

D.C. Docket No. 1:09-cv-22347-UU

MARCUS D. MIMS,

Plaintiff - Appellant,

versus

ARROW FINANCIAL SERVICES, LLC,

Defendant - Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(November 30, 2010)

Before EDMONDSON, CARNES and MARTIN, Circuit Judges.

PER CURIAM:

Marcus Mims appeals the district court's dismissal of his complaint against Arrow Financial Services, LLC, for lack of subject matter jurisdiction. Mims' complaint alleged that Arrow acted in violation of the Telephone Consumer Protection Act, 47 U.S.C. § 227. Mims

acknowledges that this Court has held that federal courts lack subject matter jurisdiction over private actions under the Act. Mims, however, contends that we should reconsider our binding precedent in light of two Supreme Court decisions and a Seventh Circuit decision. We held in *Nicholson v. Hooters of Augusta, Inc.* that "Congress granted state courts exclusive jurisdiction over private actions under the Act," and therefore "federal courts lack subject matter jurisdiction [over] private actions under the Act." 136 F.3d 1287, 1288–89 (11th Cir. 1998), *modified*, 140 F.3d 898 (11th Cir. 1998). We are bound by this precedent. *See Smith v. GTE Corp.*, 236 F.3d 1292, 1303 (11th Cir. 2001).

Mims, in asking this Court to reconsider its precedent, points to *Grable & Sons Metal Products, Inc. v. Darue Eng'g*, 545 U.S. 308, 125 S. Ct. 2363 (2005), and *Breuer v. Jim's Concrete of Brevard, Inc.*, 538 U.S. 691, 123 S. Ct. 1882 (2003). Neither of those cases considered the Act, and neither of them explicitly or implicitly overrules our precedent. *See United States v. Kaley*, 579 F.3d 1246, 1255 ("To constitute an overruling . . . the Supreme Court decision must be clearly on point.") (citations and quotations omitted). Additionally, the Seventh Circuit's decision in *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446 (7th Cir. 2005), does not overturn our precedent. *See Kaley*, 579 F.3d at 1255 ("We may disregard the holding of a prior opinion only where that holding is overruled by the Court sitting en banc or by the Supreme Court.") (citations and quotations omitted). Accordingly, the district court properly dismissed Mims' complaint for lack of subject matter jurisdiction.

AFFIRMED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Case No. 09-CV-22347-Ungaro

MARCUS D. MIMS,

Plaintiff,

v.

ARROW FINANCIAL SERVICES, LLC,

Defendant.
_____/

ORDER ON MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

THIS CAUSE came before the Court upon Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction, filed on February 17, 2010. (D.E. 14.) Plaintiff filed his Opposition to Defendant's Motion to Dismiss on March 18, 2010. (D.E. 23.) And Defendant filed a Reply on March 24, 2010. (D.E. 24.) The parties filed a Joint Stipulation for Partial Dismissal on March 25, 2010. (D.E. 26.)

THE COURT has considered the Motion and pertinent portions of the record and is otherwise fully advised in the premises.

I.

Plaintiff alleges Defendant engaged in illegal debt collection practices by leaving numerous voice mail messages on Plaintiff's cellular phone. Accordingly,

Plaintiff filed this action on August 7, 2009 seeking damages and equitable relief under the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692 *et seq.* (Counts I through IV); the Florida Consumer Collection Practices Act ("FCCPA"), Fla. Stat. § 559.55 *et seq.* (Counts V and VI); and the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227 *et seq.* (Count VII). Additionally, Plaintiff sought a declaration that Defendant violated the FCCPA and TCPA and a permanent injunction from further violations (Count VIII). (D.E. 1.)

Defendant moves to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction. Since the filing of the motion, both parties have stipulated to dismissal of the FDCPA and FCCPA claims. (D.E. 1 & 26.) Thus, the Court dismisses Plaintiff's FDCPA and FCCPA claims in Counts I through VI and VIII, leaving only the TCPA claims in Counts VII and VIII. The Court addresses the Motion to Dismiss with regard to these remaining claims.

II.

The Court lacks subject matter jurisdiction over the remaining claims. Plaintiff invoked the subject matter jurisdiction of this Court pursuant to 28 U.S.C. §§ 1331, 1337 and 15 U.S.C. § 1692k. (D.E. 1.) None of these provisions is available. First, federal question jurisdiction under § 1331 is unavailable because Congress vested jurisdiction over the TCPA exclusively in state courts.[7]

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[7] With respect to the declaratory judgment claim in Count VIII, for purposes of subject matter jurisdiction the Court analyzes the underlying claim for jurisdiction; that the claim is brought pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201 – 2202, does not

(*Footnote continued*)

See 47 U.S.C. § 227(b)(3) (2005); *Nicholson v. Hooters of Augusta, Inc.*, 136 F.3d 1287 (11th Cir. 1998) (holding that Congress has granted state courts exclusive jurisdiction over private actions under the TCPA); *Murphey v. Lanier*, 204 F.3d 911 (9th Cir. 2000); *ErieNet, Inc. v. Velocity Net, Inc.*, 156 F.3d 513 (3d Cir. 1998); *Int'l Sci. & Tech. Inst., Inc. v. Inacom Commc'ns, Inc.*, 106 F.3d 1146 (4th Cir. 1997); *Chair King, Inc. v. Houston Cellular Corp.*, 131F.3d 507 (5th Cir. 1997). And the case law cited by Plaintiff in support of § 1331 jurisdiction is inapposite.[8] *See Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446 (7th Cir. 2005) (where state class action removed under the Class Action Fairness Act was improperly remanded back to state court pursuant to TCPA); *Breuer v. Jim's Concrete of Brevard, Inc.*, 538 U.S. 691 (2003) (holding an action brought under the Fair Labor Standards Act beginning in state court was removable to federal court); *Grable & Sons Metal Prods., Inc., v. Darue Eng'g & Mfg.*, 545 U.S. 308 (2005) (holding state law quiet title claim alleging failure by IRS to give adequate notice under federal tax law was removable federal question considering the strong government interest, the effect on the federal-state division of labor, and the implication of a contested federal statute).

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of itself create a federal question. *See, e.g., Hudson Ins. Co. v. Am. Elec. Corp.*, 957 F.2d 826, 828 (11th Cir. 1992). And the only remaining underlying claim is brought pursuant to the TCPA.

[8] To be sure, "Plaintiff recognizes this Court is bound by Eleventh Circuit precedent, but Plaintiff seeks to preserve the issue for purposes of appeal." (D.E. 23.)

Second, jurisdiction under § 1337 is similarly unavailable. Section 1337(a) provides original subject matter jurisdiction for "any civil action or proceeding arising under any Act of Congress regulating commerce." "The same tests for determining whether an action 'arises under' federal law for purposes of § 1331 apply to determine whether an action 'arises under' an Act of Congress regulating commerce." *Erienet, Inc.*, 156 F.3d at 519 (citing *Franchise Tax Bd v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 8 n. 7 (1983)). Thus, jurisdiction over Plaintiff'sTCPA claims is unavailable under § 1337 for the same reason it is unavailable under § 1331. *See Nicholson*, 136 F.3d at 1289; *Erienet, Inc.*, 156 F.3d 513 at 520 (holding "Congress' intent to limit consumer suits under the TCPA to state courts supersedes the general grant of jurisdiction in § 1337.").

Third, § 1692k is inapplicable because the Court has dismissed all FDCPA claims. And finally, although Plaintiff does not invoke jurisdiction under § 1367, having dismissed all claims over which it had original jurisdiction, the Court would decline to exercise supplemental jurisdiction over the remaining claims pursuant to § 1367(c)(3) in any event. *See Mergens v. Dreyfoos*, 166 F.3d 1114, 1119 (11th Cir. 1999) (holding District Court had discretion to decline to exercise supplemental jurisdiction under § 1367 where the court had dismissed all claims over which it had original jurisdiction); *Graham v. State Farm Mutual Ins., Co.*, 193 F.3d 1274, 1282 (11th Cir. 1999) (same). Accordingly, the Court dismisses Plaintiff's remaining TCPA claims in Counts VII and VIII for lack of subject matter jurisdiction.

Accordingly, it is hereby

ORDERED AND ADJUDGED that the FDCPA and FCCPA claims in Counts I through VI and VIII are DISMISSED WITH PREJUDICE pursuant to the parties' Joint Stipulation for Partial Dismissal (D.E. 26). The Court reserves jurisdiction regarding Plaintiff's reasonable attorneys' fees and costs as to these claims. It is further

ORDERED AND ADJUDGED that the Motion (D.E. 14) is GRANTED as follows: The remaining claims (*i.e.* the TCPA claims in Counts VII and VIII) are DISMISSED for lack of subject matter jurisdiction.

DONE AND ORDERED in Chambers at Miami, Florida, this 1st day of April, 2010.

/s/ Ursula Ungaro

URSULA UNGARO
UNITED STATES DISTRICT JUDGE

cc: counsel of record

OPPOSITION BRIEF

Supreme Court, U.S.
FILED
MAY 27 2011
OFFICE OF THE CLERK

No. 10-1195

In the Supreme Court of the United States

MARCUS D. MIMS,

Petitioner,

v.

ARROW FINANCIAL SERVICES, LLC,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of Appeals erred in upholding the dismissal of plaintiff's claims under the Telephone Consumer Protection Act, Pub. L. No. 102-243, § 3(a), 105 Stat. 2394, 2395 (1991), for lack of subject matter jurisdiction.

RULE 29.6 STATEMENT

Arrow Financial Services, LLC is wholly owned by AFS Holdings, LLC, which in turn is wholly owned by Sallie Mae, Inc., which in turn is wholly owned by SLM Corp., a publicly traded company.

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STATEMENT OF THE CASE

1. Congress enacted the Telephone Consumer Protection Act (TCPA) in 1991 as part of an amendment to the Communications Act of 1934. Pub. L. No. 102-243, § 3(a), 105 Stat. 2394, 2395. The TCPA prohibits certain unsolicited marketing calls and facsimile advertisements and restricts the use of automatic dialers and prerecorded messages in non-emergency calls to cell phones. *See* 47 U.S.C. § 227(b)(1)-(2).

Although many states had already passed laws seeking to regulate or prohibit unsolicited telemarketing, those laws had "had limited effect ... because States do not have jurisdiction over interstate calls," S. Rep. No. 102-178, at 3 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1968, 1970, and "telemarketers [could] easily avoid the restrictions of State law, simply by locating their phone centers out of state," H.R. Rep. No. 102-317, at 9 (1991). "Many States ha[d] expressed a desire for Federal legislation to regulate interstate telemarketing calls to supplement their restrictions on intrastate calls." S. Rep. No. 102-178, at 3. "Congress intended the TCPA to provide 'interstitial law preventing evasion of state law by calling across state lines.'" *Gottlieb v. Carnival Corp.*, 436 F.3d 335, 342 (2d Cir. 2006) (Sotomayor, J.) (quoting *Van Bergen v. Minnesota*, 59 F.3d 1541, 1548 (8th Cir. 1995)). "Congress thus sought to put the TCPA on the same footing as state law, essentially supplementing state law where there were perceived jurisdictional gaps." *Gottlieb*, 436 F.3d at 342.

The TCPA contains distinct provisions for private parties on the one hand, and state attorneys general on the other, to enforce its prohibitions. The TCPA's

private right of action allows a person, "if otherwise permitted by the laws or rules of court of a State, [to] bring in an appropriate court of that State" a private action for damages or injunctive relief, and entitles a successful plaintiff to recover actual damages or statutory damages of $500 per violation. 47 U.S.C. § 227(b)(3). A separate provision authorizes state attorneys general to bring civil actions for damages and injunctive relief, over which the federal courts "shall have exclusive jurisdiction." *Id.* § 227(g)(1), (2). The TCPA does not prevent state officials from bringing similar actions in state court or otherwise exercising their powers under state law. *See id.* § 227(g)(5), (6).

In explaining the law's "private right-of-action provision," the sponsor of the law explained that "[t]he provision would allow consumers to bring an action in State court against any entity that violates the bill." 137 Cong. Rec. 30,821 (1991) (statement of Senator Hollings). Senator Hollings further stated that "it is my hope that States will make it as easy as possible for consumers to bring such actions [in state court], preferably in small claims court." *Id.* He also admonished that he "expect[ed] that the States will act reasonably in permitting their citizens to go to court to enforce this bill," but added that "the bill [also] permits the State attorneys general to enforce the provisions of the bill in Federal court." *Id.* at 30,822.

In 1998, construing the text in context and in light of Congress's stated purpose, the Eleventh Circuit held that there is no federal-question jurisdiction under 28 U.S.C. § 1331 over private actions under the TCPA. *See Nicholson v. Hooters of Augusta, Inc.*, 136 F.3d 1287, 1289 (11th Cir.), *modified*, 140 F.3d 898 (11th Cir.

1998). Until December 2010, that was the uniform view of the courts of appeals. *See Foxhall Realty Law Offices, Inc. v. Telecomms. Premium Servs., Ltd.*, 156 F.3d 432, 435-37 (2d Cir. 1998); *ErieNet, Inc. v. Velocity Net, Inc.*, 156 F.3d 513, 519 (3d Cir. 1998); *International Sci. & Tech. Inst., Inc. v. Inacom Commc'ns, Inc.*, 106 F.3d 1146, 1158 (4th Cir. 1997); *Chair King, Inc. v. Houston Cellular Corp.*, 131 F.3d 507, 514 (5th Cir. 1997); *Murphey v. Lanier*, 204 F.3d 911, 915 (9th Cir. 2000).

2. In August 2009, Petitioner filed a complaint in the United States District Court for the Southern District of Florida, alleging that respondent, Arrow Financial Services, LLC (Arrow), had placed telephone calls to his cell phone without his prior consent using an auto-dialer system, in an effort to collect a debt from Petitioner. The complaint alleged violations of the TCPA, the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692 *et seq.*, and the Florida Consumer Collection Practices Act (FCCPA), Fla. Stat. § 559.55 *et seq.*[1]

After the parties stipulated to dismissal of Petitioner's FDCPA and FCCPA claims, Arrow moved to dismiss Petitioner's TCPA claim for lack of subject matter jurisdiction, citing the Eleventh Circuit's prior decision in *Nicholson* holding that the federal courts lacked federal-question jurisdiction over such claims. The district court granted Arrow's motion and

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[1] At the time petitioner filed his complaint, it was the settled law of the Eleventh Circuit that federal courts lack federal-question jurisdiction over private TCPA suits. *See, e.g., Nicholson*, 136 F.3d at 1289. Petitioner does not claim that the courts of the state of Florida were an inadequate forum. *Cf.* Pet. 11-12 n.5.

dismissed. Petitioner appealed, arguing that the Court of Appeals should reconsider *Nicholson* in light of this Court's decisions in *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308 (2005), and *Breuer v. Jim's Concrete of Brevard, Inc.*, 538 U.S. 691 (2003).

The Eleventh Circuit summarily affirmed in an unpublished per curiam opinion. Pet. App. 1a-2a. The court cited its prior decision in *Nicholson* holding "that federal courts lack subject matter jurisdiction over private actions under the Act," 136 F.3d at 1289, and explained that neither *Grable* nor *Breuer* considered the TCPA or "explicitly or implicitly" abrogated *Nicholson*. Pet. App. 2a. Petitioner did not seek rehearing *en banc*.

REASONS FOR DENYING THE WRIT

I. THE ASSERTED SPLIT IN AUTHORITY IS LOPSIDED, VERY RECENT, AND WARRANTS FURTHER PERCOLATION

In the first two decades after the TCPA was enacted, the six courts of appeals that had squarely addressed the issue had uniformly concluded that there is no federal-question jurisdiction over private TCPA suits. *See Foxhall Realty Law Offices, Inc. v. Telecomms. Premium Servs., Ltd.*, 156 F.3d 432, 435-37 (2d Cir. 1998); *ErieNet, Inc. v. Velocity Net, Inc.*, 156 F.3d 513, 519 (3d Cir. 1998); *International Sci. & Tech. Inst. v. Inacom Commc'ns, Inc.*, 106 F.3d 1146, 1158 (4th Cir. 1997); *Chair King, Inc. v. Houston Cellular Corp.*, 131 F.3d 507, 514 (5th Cir. 1997); *Murphey v. Lanier*, 204 F.3d 911, 915 (9th Cir. 2000); *Nicholson v. Hooters of Augusta, Inc.*, 136 F.3d 1287, 1289 (11th Cir.), *modified*, 140 F.3d 898 (11th Cir. 1998). There is no indication that the Act did not function as desired

during that period due to this jurisdictional rule and, indeed, as explained below, Congress has amended the statute in other respects but has not touched the jurisdictional provision at issue here.

Departing from that uniform line of precedent, the Sixth Circuit held in December 2010 that there is federal-question jurisdiction under the TCPA over private actions filed under the Act. *See Charvat v. Echostar Satellite, LLC*, 630 F.3d 459, 463-64 (6th Cir. 2010). The asserted "split" on the question presented is therefore both lopsided (1-6) and nascent, having emerged less than six months ago and decades after the enactment of the TCPA.

Petitioner argues that the decision below also conflicts with the Seventh Circuit's decision in *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446 (7th Cir. 2005). But while dictum in *Brill* supports Petitioner's position, *see id.* at 450-52, the holding of *Brill* is addressed to a different question, eliminating any actual conflict between this case and *Brill*. In *Brill*, the Seventh Circuit *held* only that a private TCPA action originally filed in a state court may be removed to a federal court pursuant to the Class Action Fairness Act of 2005, § 1 *et seq.*, where the requirements for diversity jurisdiction under 28 U.S.C. § 1332 are met. *See* 427 F.3d at 447-50. This case does not involve any question of removal, under the Class Action Fairness Act or any other provision. Moreover, Petitioner's claimed basis for federal jurisdiction is 28 U.S.C. § 1331 (federal question), not § 1332 (diversity).

Both the Second and Third Circuits have addressed the distinct question whether *diversity* jurisdiction is available in private TCPA actions that satisfy the requirements of the federal-diversity statute (§ 1332).

As those courts have recognized, that question is distinct from whether *federal-question* jurisdiction exists over such actions and turns on different considerations. *See Landsman & Funk PC v. Skinder-Strauss Assocs.*, — F.3d —, Nos. 09-3532, 09-3793, 09-3105, 2011 WL 1226371, at *7 (3d Cir. Apr. 4, 2011) (explaining "the meaningful difference between federal question jurisdiction, a constrained basis for jurisdiction that applies in a 'narrow class' of federally-oriented cases, and diversity jurisdiction, which has traditionally been open to claims based on any cause of action out of concern for avoiding bias against out-of-state parties") (citation omitted), *reh'g en banc granted*, — F.3d —, 2011 WL 1879624 (3d Cir. May 17, 2011); *Gottlieb v. Carnival Corp.*, 436 F.3d 335, 338-43 (2d Cir. 2006) (Sotomayor, J.) (holding that although Congress did not authorize federal-question jurisdiction over private TCPA claims, diversity jurisdiction under § 1332 remains available); *accord US Fax Law Ctr., Inc. v. iHire, Inc.*, 476 F.3d 1112, 1116 (10th Cir. 2007), *cert. denied*, 552 U.S. 1139 (2008). Every circuit that has addressed *that* distinct jurisdictional question agrees that diversity jurisdiction is available for TCPA claims. And that question is not presented here. As Petitioner concedes, "[i]t is undisputed that" there is no potential "basis for [federal] jurisdiction [in this case] other than federal-question jurisdiction." Pet. 12.

The Third Circuit recently granted rehearing *en banc* in *Landsman*. *See* 2011 WL 1879624 (3d Cir. May 17, 2011) (order granting reh'g en banc), *available at* http://www.ca3.uscourts.gov/opinarch/093105poen.pdf. Unlike this case, *Landsman* presents both the diversity and federal-question aspects of the jurisdictional issue. If this Court believes that

certiorari may be warranted to consider the jurisdiction conferred by the TCPA, the more prudent and efficient course would be to wait for a vehicle like *Landsman*, which would allow the Court to address both diversity and federal-question jurisdiction at once. Waiting at least for *Landsman* also would ensure that the Court would have the benefit of the *en banc* Third Circuit's considered views on both aspects of the federal-jurisdiction issue.[2]

II. THE DECISION BELOW IS CONSISTENT WITH THIS COURT'S PRECEDENTS AND WITH THE INTENT OF CONGRESS

The longstanding and, until recently, uniform view of the courts of appeals that the federal courts lack federal-question jurisdiction over private TCPA claims is consistent with this Court's precedents as well as with the intent of Congress.

A. The Asserted Conflict With This Court's Decisions Is Unavailing

Contrary to Petitioner's assertion (Pet. 15), there is no conflict between the decision below and this Court's decision in *Tafflin v. Levitt*, 493 U.S. 455 (1990). In *Tafflin*, this Court held that the federal RICO statute's permissive grant of federal jurisdiction does not *divest state courts* of concurrent jurisdiction over private RICO actions. *Id.* at 460-61. The question in this case, however, concerns the effect of the TCPA's *assignment* of jurisdiction to the state courts over

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[2] As Petitioner notes (at 6), then-Judge Alito dissented from the Third Circuit's decision in *ErieNet* holding that federal courts lack federal-question jurisdiction over private TCPA actions. 156 F.3d at 519. The prominence of a dissenter, however, is not sufficient to create a circuit conflict.

private claims brought under the Act. As several courts of appeals have explained, an affirmative assignment of jurisdiction to state courts has a different effect than the permissive grant of jurisdiction to federal courts at issue in *Tafflin*. "The difference derives from the fact that state courts are courts of general jurisdiction and are accordingly presumed to have jurisdiction over federally-created causes of action unless Congress indicates otherwise, whereas federal courts are courts of limited jurisdiction ...." *Foxhall*, 156 F.3d at 435 (citing *Tafflin*, 493 U.S. at 460-61, and *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 449 (1850)); *accord ErieNet*, 156 F.3d at 516-17 & n.2; *Chair King*, 131 F.3d at 512; *International Sci.*, 106 F.3d at 1151-52. *Tafflin* spoke only to whether state court jurisdiction, which exists apart from any Act of Congress, had been ousted. *See* 493 U.S. at 459 ("[N]othing in the concept of our federal system prevents state courts from enforcing rights created by federal law."). *Tafflin* is thus readily distinguishable, and in no way conflicts with the circuit courts' longstanding view that federal-question jurisdiction, which is a creature of statute, is not available here.

Petitioners also argue that this Court's decisions in *Grable* and *Breuer* are "in tension with" the decisions of the six circuits holding that federal-question jurisdiction is not available for TCPA claims—stopping short of arguing that the decision below actually conflicts with *Grable* and *Breuer*. *See* Pet. 15-16. But as the Eleventh Circuit here explained, *Grable* and *Breuer* involved different questions and are therefore inapposite.

Grable examined the narrow circumstances in which a *state law* claim gives rise to federal-question

jurisdiction. It held only that a substantial federal issue present in a state-law claim may, in some circumstances, be sufficient to trigger federal-question jurisdiction under § 1331. The Court explained that even where there is a substantial federal issue, a case "will ultimately qualify for a federal forum only if federal jurisdiction is consistent with congressional judgment about the sound division of labor between state and federal courts ...." *Grable*, 545 U.S. at 313-14. In the TCPA, however, Congress's expressed its judgment that private TCPA claims should be heard in state court. The statute "refers potential plaintiffs to the state courts[,] ... does not appear to reflect any significant federal interest, ... [and] does not reflect an attempt by Congress to occupy this field ... or to promote national uniformity of regulation." *ErieNet*, 156 F.3d at 515. Rather, Congress recognized that "[f]ederal legislation was necessary in order to prevent telemarketers from evading state restrictions." *Id.*

Breuer similarly is off the mark. *Breuer* involved the Fair Labor Standards Act, which provides that a private suit "'may be maintained ... in any Federal or State court of competent jurisdiction.'" 538 U.S. at 693 (quoting 52 Stat. 1069, as amended, 29 U.S.C. § 216(b)). Because Congress explicitly created a private right of action that could be brought "in any Federal or State court," there was no dispute in *Breuer* about whether the federal courts would have original jurisdiction under § 1331. *See id.* at 694 ("There is no question that Breuer could have begun his action in the District Court."). The issue in that case was whether the FLSA provision nevertheless prohibited *removal* to federal court under § 1441(a), by specifying that suits "may be maintained." This Court held that it did not,

reasoning that because there was, indisputably, federal-question jurisdiction over such claims, removal under §1441(a) was permitted unless Congress expressly prohibited it. *See id.* at 695-700. This case, as explained, does not involve any question respecting removal.

Moreover, neither *Grable* nor *Breuer* involved a statute that possesses the "unusual constellation of statutory features" present in the TCPA: (1) the express creation of a private right of action, (2) an express assignment of jurisdiction to the state courts to consider such private actions, and (3) and an express jurisdictional grant to federal courts to entertain actions brought by state attorneys general. *Chair King*, 131 F.3d at 512-13; 47 U.S.C. § 227(b)(3), (g)(2). As then-Judge Sotomayor observed in *Gottlieb*, the TCPA private right of action is truly "*sui generis*." 436 F.3d at 342 n.8. At a minimum, the *sui generis* nature of the TCPA defeats Petitioner's claim that the decision below conflicts with this Court's decisions.

B. The Decision Below Is Correct And Consistent With The Intent Of Congress

As six courts of appeals have concluded, the text, structure, and legislative history of the statute all point to the conclusion that there is no federal-question jurisdiction over private TCPA claims.

Section 227(b)(3) provides, in relevant part:

> A person or entity may, *if* otherwise permitted by the laws or rules of court of a State, bring in an appropriate *court of that State* [a private claim under the TCPA].

47 U.S.C. § 227(b)(3) (emphases added). The plain and ordinary meaning of the qualifying phrase "may, *if* otherwise permitted by ... a State" is that the private right of action is contingent on such state permission. The next clause, which specifies that such actions are to be brought "in an appropriate court of *that State*," plainly evinces congressional intent that such suits are to be brought in state court—to the extent allowed by state law.

Petitioner argues that Congress's unambiguous assignment of jurisdiction to the state courts over private actions brought under the Act does not divest the federal courts of jurisdiction to entertain such actions. But several customary sign posts of Congress's intent point to the opposite conclusion and confirm that Congress did not confer federal jurisdiction over private actions under the TCPA.

First, the "broader context of the statute as a whole," *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997), confirms that Congress did not confer federal jurisdiction over private actions under the TCPA. Congress drew clear jurisdictional lines based on the party enforcing the Act. The private enforcement provision unambiguously vests jurisdiction in the state courts over such claims. *See* 47 U.S.C. § 227(b)(3). By contrast, Congress gave the federal courts exclusive jurisdiction when the action was brought by a state attorney general. *Id.* § 227(g)(1), (2). The juxtaposition between those two provisions makes clear that Congress had different jurisdictional schemes in mind.

Moreover, elsewhere in the Communications Act, where Congress intended to authorize concurrent federal and state jurisdiction, it did so explicitly. *See id.* §§ 214(c), 407, 415(f), 553(c)(1), 555(a), 605(e)(3)(A). And elsewhere in the TCPA, where Congress

expressly provided for federal-court jurisdiction, Congress saw fit to address venue, service of process, and possible conflicts with FCC enforcement efforts. *See id.* § 227(g)(2) (authorizing state attorneys general to bring an action in federal court); § 227(g)(4), (7) (venue, service of process, conflicts). Section 227(b), by contrast, says nothing about those issues. In context, then, Congress's silence as to federal jurisdiction for § 227(b) speaks volumes. *Cf. Northwest Airlines, Inc. v. Transport Workers Union of Am.*, 451 U.S. 77, 97 (1981) ("The presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement.").

Second, as several courts of appeals have explained, Petitioner's preferred reading of the provision at issue as merely "confirming" the availability of a state forum would render it superfluous, because state courts would have had jurisdiction over private TCPA actions even if the statute said *nothing* about state-court jurisdiction. *See, e.g.*, *ErieNet*, 156 F.3d at 516 (citing *Tafflin*, 493 U.S. at 458-59, and noting the well-settled presumption in favor of state-court jurisdiction over claims created by federal law). Indeed, it is "'black letter law'" that state courts generally have jurisdiction to entertain federal causes of action. *Tafflin*, 493 U.S. at 461 (citation omitted). Petitioner provides no convincing reason why Congress would go out of its way to say that state courts could entertain private actions under the TCPA—when that obviously would be the case. The fact that Petitioner's interpretation renders the provision completely superfluous is a powerful reason for rejecting that interpretation. This Court strains to avoid rendering

Congress's words a nullity. *See, e.g., TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (statutes should be read to avoid making language "'superfluous, void, or insignificant'" (citation omitted)). It should do no less here.

Third, the legislative history confirms that this provision was *not* intended to be superfluous, but instead to confer exclusive jurisdiction on state courts to entertain a particular class of claims under the TCPA, *i.e.*, private actions. As discussed above, the law's sponsor explained that the law contains a private-right-of-action provision that "would allow consumers to bring an action in State court against any entity that violates the bill." 137 Cong. Rec. at 30,821 (statement of Sen. Hollings). Senator Hollings went on to explain:

> The bill does not, because of constitutional constraints, dictate to the States which court in each State shall be the proper venue for such an action, as this is a matter for State legislators to determine. Nevertheless, it is my hope that States will make it as easy as possible for consumers to bring such actions, preferably in small claims court. .... Small claims court or a similar court would allow the consumer to appear before the court without an attorney.

Id. The reference to small claims court—which is consistent with the relatively small amounts of damages available in TCPA actions—underscores that Congress believed that private actions were best suited for state rather federal court. Moreover, in the same passage, the sponsor contrasted the provision of the TCPA "permit[ting] the State attorneys general to

enforce the provisions of the bill *in Federal court*," underscoring the different jurisdictional schemes Congress intended depending on which party brought the action. *Id.* at 30,822 (emphasis added).

Finally, the first six courts of appeals that addressed the question all concluded that there is no federal-question jurisdiction over of private TCPA claims, yet Congress did not act to revise the provision. That congressional acquiescence is significant, because Congress enacted various amendments to the TCPA from 1992-2010, but did not alter the language relevant here. *See* Pub. L. No. 111-331, § 2, 124 Stat. 3572, 3572-75 (2010); Pub. L. No. 109-21, §§ 2, 3, 119 Stat. 359, 359-63 (2005); Pub. L. No. 108-187, § 12, 117 Stat. 2699, 2717 (2003); Pub. L. No. 103-414, § 303(a)(11)-(12), 108 Stat. 4279, 4294 (1994); Pub. L. No. 102-556, § 402, 106 Stat. 4181, 4194-95 (1992). Congress should thus be presumed to have ratified the uniform view of the courts of appeals. *See, e.g.*, *General Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 593-94 (2004); *Evans v. United States*, 504 U.S. 255, 268-69 (1992); *cf. Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, — U.S. —, 130 S. Ct. 1605, 1616 (2010) (Congress presumed to have adopted judicial interpretation of three courts of appeals that had interpreted the Truth in Lending Act's "bona fide error" defense when it used identical language in a later-enacted statute).

The fact that Congress has not acted to address the line of circuit precedent that Petitioner attacks—even though Congress has amended the TCPA on several occasions—indicates that Congress has no objection to that precedent, and counsels against this Court's intervention at this preliminary stage of the alleged conflict.

III. IN ANY EVENT, THIS CASE IS AN INFERIOR VEHICLE FOR RESOLUTION OF THE QUESTION PRESENTED

Petitioner warns that if this Court "does not grant review in this case, it risks being unable to address the issue for lack of another good vehicle." Pet. 12. That statement not only is at odds with Petitioner's assertion that the question presented occurs with "staggering frequency" (Pet. 9), it is plainly unfounded.

Just last month, the Third Circuit issued a thorough published opinion reaffirming its holding in *ErieNet* that there is no federal-question jurisdiction over private TCPA claims, and agreeing with the Second Circuit's decision in *Gottlieb* holding that diversity jurisdiction under § 1332 remains available. *Landsman*, — F.3d —, 2011 WL 1226371, at *7-13. The Third Circuit recently granted rehearing *en banc* in *Landsman*. 2011 WL 1879624 (3d Cir. May 17, 2011). Unlike *Landsman*, this case presents only one dimension of the federal-jurisdiction issue, in a brief unpublished opinion. If this Court believes that certiorari may be warranted to consider the jurisdiction conferred by the TCPA, the more prudent and efficient course would be to wait for a vehicle like *Landsman*, which would allow the Court to address both diversity and federal-question jurisdiction at once, with the benefit of the *en banc* Third Circuit's considered views and any further developments in the case law.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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REPLY BRIEF

No. 10-1195

IN THE

Supreme Court of the United States

MARCUS D. MIMS,

Petitioner,

v.

ARROW FINANCIAL SERVICES, LLC,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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INTRODUCTION

Respondent Arrow Financial Services concedes that there is a square circuit conflict over the question presented—whether the Telephone Consumer Protection Act (TCPA) precludes federal question jurisdiction over claims that indisputably arise under federal law. Arrow attempts to minimize the conflict, however, and suggests that it might best be resolved later, after the Third Circuit completes en banc rehearing in yet another case raising the issue.

Arrow's effort to downplay the scope of a longstanding conflict rests on a mischaracterization of the Seventh Circuit's decision in *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446 (2005). As the Seventh Circuit recently confirmed, *Brill* directly *holds* that federal courts have *federal question* jurisdiction as well as diversity jurisdiction over TCPA claims. *See Sawyer v. Atlas Heating & Sheet Metal Works, Inc.*, __ F.3d __, 2011 WL 2039663, at *1 (May 26, 2011).

And contrary to Arrow's suggestion, the Third Circuit's grant of rehearing en banc in *Landsman & Funk PC v. Skinder-Strauss Associates*, 2011 WL 1879624 (3d Cir. May 17, 2011)—which came after a panel split *three ways* on the question of federal jurisdiction over TCPA claims, *see* __ F.3d __, 2011 WL 1226371 (3d Cir. Apr. 4, 2011)—only underscores the lower courts' confusion and the need for guidance from this Court to resolve the conflict, which will persist no matter the ultimate result in *Landsman*.

Arrow's remaining arguments go principally to the merits rather than the need for review. Even as merits arguments they fail to establish that the TCPA overrides 28 U.S.C. § 1331's grant of federal jurisdiction over cases arising under federal law.

ARGUMENT

1. Arrow agrees that the decision below and other appellate decisions holding that the TCPA forecloses assertion of federal question jurisdiction under 28 U.S.C. § 1331 over claims arising under the Act directly conflict with the Sixth Circuit's decision in *Charvat v. Echostar Satellite LLC*, 630 F.3d 459 (2010). Arrow argues, however, that this conflict is so one-sided and of such recent vintage that the Court should allow the issue to "percolate" further through the lower courts before taking it up.

Arrow's argument rests on its claim that the Seventh Circuit's earlier decision in *Brill* does not really hold that federal courts can exercise jurisdiction over TCPA claims under § 1331, but only that federal courts may assert diversity jurisdiction over TCPA claims. That argument reflects a clear misreading of *Brill*. To be sure, the defendant in *Brill* cited diversity jurisdiction under the Class Action Fairness Act's amendments to 28 U.S.C. § 1332 as the basis for removal, but the Seventh Circuit's holding that federal jurisdiction was proper was based on the court's ruling that the TCPA does not provide for exclusive jurisdiction in state courts and thus does not displace either diversity jurisdiction *or* federal question jurisdiction. *See* 427 F.3d at 450-51.

Moreover, because the removal in *Brill* was proper if there was jurisdiction under either § 1331 or § 1332, *see id.* at 451, the court appropriately addressed both diversity and federal question jurisdiction: "[R]emoval is authorized not only by the Class Action Fairness Act but also by [28 U.S.C.] § 1441, because the claim arises under federal law." *Id.* The court's conclusion that there was federal question jurisdiction thus was

an alternative holding, not dicta. The Seventh Circuit, like most courts, treats its alternative holdings as binding precedents. *See Reiser v. Residential Funding Corp.*, 380 F.3d 1027, 1030 (2004) ("There is a big difference between dicta and alternative holdings."); *Whetsel v. Network Prop. Servs., LLC*, 246 F.3d 897, 903 (2001) (alternative holdings are "entitled to precedential weight").

Thus, district courts within the Seventh Circuit are bound to exercise federal question jurisdiction over TCPA claims and regularly do so. *See, e.g., Vigus v. S. Ill. Riverboat/Casino Cruises, Inc.*, __ F.R.D. __, 2011 WL 884092 at *2, n.1 (S.D. Ill. Mar. 11, 2011); *Wilder Chiropractic, Inc. v. Pizza Hut of S. Wis., Inc.*, 754 F. Supp. 2d 1009, 1020 (W.D. Wis. 2010); *Benedia v. Super Fair Cellular, Inc.*, 2007 WL 2903175 at *1 (N.D. Ill. Sept. 26, 2007). As the court stated in *Benedia*, "there is no basis to limit *Brill* to its facts ... and deny jurisdiction over a claim brought in federal court initially, pursuant to 28 U.S.C. § 1331." 2007 WL 2903175, at *1. Similarly, the court in *Vigus* recognized that *Brill* "held" that TCPA claims are subject to federal question jurisdiction and that district courts within the Seventh Circuit are "bound by that precedent." 2011 WL 884092, at *2, n.1.

The Seventh Circuit's recent decision in *Sawyer* confirms this reading of *Brill*. There, in deciding the merits of a certified interlocutory appeal involving statute of limitations issues in a TCPA case, the court stated that the case was "[p]roperly in federal court" under "federal-question jurisdiction" because, although counsel for some of the parties "may have believed that state courts have exclusive jurisdiction of suits under § 227, ... *we held otherwise in Brill* ...."

2011 WL 2039663, at *1 (emphasis added). The court's express characterization of *Brill*'s ruling on federal question jurisdiction as a holding, and its reliance on that holding to deem "proper" the exercise of jurisdiction over a TCPA claim under § 1331, belies Arrow's suggestion that the question presented remains open in the Seventh Circuit.

When its mischaracterization of *Brill* is set aside, Arrow's attempt to paint the conflict as entirely one-sided and of too recent vintage to merit resolution by this Court quickly fails. The conflict has persisted for nearly six years; eight courts of appeals (not to mention district courts in the three remaining regional circuits) have weighed in on it; and although the earlier appellate decisions rejected federal question jurisdiction over TCPA claims, the two more recent published precedents on the subject, *Charvat* and *Brill*, written by Judges Sutton and Easterbrook, take the opposite view. The issues have been well fleshed out in the many opinions on the subject; the disagreement among the courts is entrenched, and the time to resolve it is at hand.

2. The Third Circuit proceedings in *Landsman* only underscore the confusion in the lower courts and the need for guidance from this Court. In the now-vacated panel decision, three judges split three ways on the issue of the TCPA's impact on federal question jurisdiction. The author of the lead opinion, Judge Rendell, adhered to the court's earlier holding in *ErieNet, Inc. v. Velocity Net, Inc.*, 156 F.3d 513 (3d Cir. 1998), that the TCPA forecloses federal question jurisdiction. She took the view, however, that diversity jurisdiction over TCPA claims was nonetheless permissible. 2011 WL 1226371, at *1-*13. Chief Judge

McKee, concurring in the judgment, would have adopted then-Judge Alito's view from his *ErieNet* dissent that the TCPA does not oust federal question jurisdiction any more than it does diversity jurisdiction. *Id.* at *17-*22. And Judge Garth, dissenting, would have held that the TCPA forecloses both federal question and diversity jurisdiction. *Id.* at *22-*28.

Thus, two judges agreed that there was federal jurisdiction over the claims at issue. But at the same time, a different two-judge combination agreed with Judge Easterbrook's fundamental point in *Brill* that "if state jurisdiction [over TCPA claims] really is 'exclusive,' then it knocks out § 1332 as well as § 1331," 427 F.3d at 450; they disagreed, however, over whether state jurisdiction is indeed exclusive. And yet another duo agreed that the TCPA forecloses federal question jurisdiction, though their reasons for reaching that conclusion were inconsistent, with one viewing state-court TCPA jurisdiction as truly exclusive and the other disagreeing. The Third Circuit's fractured panel decision in *Landsman* thus replicates the circuit-split that already existed and reinforces the need for an authoritative resolution.

Contrary to Arrow's suggestion, there is no reason to wait for the Third Circuit's en banc decision, meanwhile leaving the lower courts in a state of confusion, before this Court takes up the issue. Although the en banc proceedings create the possibility that the Third Circuit will switch sides, the conflict over whether the TCPA forecloses federal question jurisdiction over claims that arise under it will persist no matter what the en banc court decides. Forcing the full Third Circuit to choose sides on a question that this Court will ultimately have to resolve anyway is a

waste of judicial resources, especially because the competing arguments have been fully developed not only in the appellate decisions that already existed on the issue, but also in the three opinions by the *Landsman* panel.

Moreover, although *Landsman* also involves the question of diversity jurisdiction, that twist provides no reason to wait for the en banc decision before taking up the issue of federal question jurisdiction. To begin with, a holding by this Court that the TCPA does *not* foreclose federal question jurisdiction not only would likely apply as well to diversity jurisdiction, but also would render the diversity issue academic. Moreover, there is currently no conflict requiring resolution by this Court over whether diversity jurisdiction is available, so there is no reason to prefer a case that has the added feature of diversity among the parties. Indeed, granting review in such a case would create the possibility that the Court might reach only the question of diversity jurisdiction while failing to resolve the conflict over federal-question jurisdiction, which would eventually necessitate taking up yet another case to settle that question. This case, which concededly presents the federal question issue cleanly, is the ideal vehicle for resolving this longstanding, intractable, recurring, and important conflict.

3. Arrow's remaining arguments are no more persuasive. Citing obvious differences between the TCPA jurisdictional question and the specific issues decided by this Court in *Breuer v. Jim's Concrete of Brevard, Inc.*, 538 U.S. 691 (2003), and *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308 (2005), Arrow denies that those decisions are in tension with the decision below. Arrow's

emphasis on superficial differences between the cases fails to come to grips with the relevance of the fundamental principles on which they rest.

Breuer holds that a statute permitting a state court to decide a particular type of federal claim should not be read to implicitly divest federal courts of their statutory jurisdiction over the same type of claim. That *Breuer* happened to involve removal jurisdiction while this case involves original jurisdiction is a distinction without a difference. Similarly, *Grable* holds that § 1331 broadly confers federal jurisdiction not only over cases (like this one) in which federal law creates a right of action, but also over cases in which claims rest on substantial and contested questions of federal law, absent a clear indication that assertion of federal jurisdiction would "distur[b] any congressionally approved balance of federal and state judicial responsibilities." 545 U.S. at 314. That principle, too, is fully applicable here.

In addition, Arrow disputes the pertinence of *Tafflin v. Levitt*, 493 U.S. 455 (1990), where this Court applied the longstanding principle that a permissive grant of jurisdiction to one court (there, RICO's jurisdictional grant to federal courts) does not implicitly displace jurisdiction otherwise available to another court (there, a state court of general jurisdiction). Arrow's answer, that *Tafflin* is not applicable where a statute "assigns" exclusive jurisdiction to one court, assumes the conclusion that the TCPA's permissive grant of jurisdiction to state courts should be read as such an exclusive "assignment." Arrow's argument not only begs the question, but also is directly contrary to *Tafflin*'s holding that permissive language

should *not* be read as an assignment of exclusive jurisdiction.

Arrow's argument is equally impossible to square with the longstanding principle announced in *Rosencrans v. United States*, 165 U.S. 257, 262 (1897), that express jurisdictional grants (such as the one in § 1331) "should not be disturbed by a mere implication flowing from subsequent legislation." Arrow does not mention *Rosencrans*, let alone attempt to square its position with that decision.

Moreover, as Chief Judge McKee's concurring opinion in *Landsman* points out, the argument that the TCPA displaces § 1331's preexisting jurisdictional grant is also inconsistent with other opinions of this Court, including *Whitman v. Department of Transportation*, 547 U.S. 512 (2006), and *Verizon Maryland, Inc. v. Public Service Commission of Maryland*, 535 U.S. 635 (2002), which hold that jurisdiction under § 1331 remains available for the assertion of federal claims unless specifically divested by statute.

4. Arrow's repetition of the merits arguments supporting its interpretation of the TCPA establishes, at most, that there are arguments on both sides of the issue—which is hardly surprising for a question that has produced a deep division among the circuits. That Arrow can muster arguments for its position only goes to show that it will have something to say in its merits brief, not that this Court should not resolve the issue that has so bedeviled the lower courts.

That said, the particular arguments that Arrow highlights are singularly unpersuasive. Arrow (at 11) asserts that the Act "unambiguously vests jurisdiction in the state courts over" private TCPA claims while giving "the federal courts exclusive jurisdiction when

the action was brought by a state attorney general." Those facts, however, hardly establish that Congress "unambiguously" provided the state courts with *exclusive* jurisdiction over private claims, which is the proposition Arrow must establish to prevail. The juxtaposition of the two sections establishes only that state courts *may* exercise jurisdiction over private TCPA claims but *may not* entertain actions by state attorneys general; it says nothing about whether *federal* courts may entertain private actions. Indeed, Congress's failure to say expressly that state-court jurisdiction over private actions is exclusive—as it expressly said that federal court jurisdiction over state attorney-general actions is exclusive—implies just the opposite. *See Brill*, 427 F.3d at 451.

Arrow also argues that Congress's failure to enact special venue and service-of-process rules for private TCPA actions in federal court, as it did for state attorney-general actions, implies that Congress intended to repeal § 1331's jurisdictional grant. But the absence of special provisions only reflects that no such special provisions are needed for ordinary actions brought by injured persons under the standard jurisdictional grants of 28 U.S.C. §§ 1331 and 1332; the ordinary venue and service-of-process rules applicable to all such cases are equally applicable to TCPA cases filed under those jurisdictional grants. Similarly, no special provisions regarding conflicts between enforcement proceedings brought by different governmental entities are needed for private actions, whether brought in federal or state court. The absence of such provisions applicable to private actions is, therefore, wholly irrelevant.

Further, Arrow asserts (at 12) that if the TCPA's expressly permissive grant of jurisdiction to state courts is not interpreted to preclude federal jurisdiction, it is "completely superfluous" because state courts would have such jurisdiction anyway. Arrow does not even attempt to respond to Judge Easterbrook's refutation of that argument in *Brill*, which demonstrates that the TCPA provision concerning state-court jurisdiction serves two important functions, even though it does not confer exclusive jurisdiction: First, the provision conclusively rules out any argument that *federal-court* jurisdiction is exclusive. Second, it spells out the conditions under which a state court need *not* take jurisdiction over TCPA claims (namely, if bringing the action in that particular court is not "otherwise permitted by the laws or rules of court of a State," 47 U.S.C. § 227(b)(3)). *See Brill*, 427 F.3d at 451. Arrow's argument that allowing federal jurisdiction renders § 227(b)(3) "completely superfluous" is flatly wrong.

Arrow also points (at 13) to a snippet of legislative history—one Senator's floor statement—that does not even speak to the point at issue. The few sentences Arrow quotes, while accurately stating that the TCPA would permit actions to be brought in state courts, including small-claims courts, nowhere suggest that such actions could be brought *only* in state courts, and they contain no discussion of the availability of federal jurisdiction.

Arrow thus falls back on an appeal to congressional inaction and acquiescence, neglecting this Court's "oft-expressed skepticism toward reading the tea leaves of congressional inaction." *Rapanos v. United States*, 547 U.S. 715, 749 (2006) (plurality opinion);

see also, e.g., Solid Waste Agency of N. Cook County v. Army Corps of Eng'rs, 531 U.S. 159, 169-70 (2001). Moreover, Arrow points to no legislative actions (such as re-enactment of the same or similar statutory language), or even any failed legislative proposals, that would suggest that any Congress subsequent to the one that enacted the TCPA ever gave any consideration to the "precise issue" presented by the cases. *Bob Jones Univ. v. United States*, 461 U.S. 574, 600 (1983). Moreover, given the conflicting appellate decisions on whether the TCPA ousts the courts of federal question jurisdiction since *Brill* was decided nearly six years ago, Congress's silence is even less useful than usual as an interpretative aid: Where Congress fails to act in the face of legal uncertainty, its "silence is at best ambiguous." *Heckler v. Turner*, 470 U.S. 184, 199 (1985). There is no more reason to think Congress endorsed one position than to think it endorsed the other when it did *nothing at all* to address the question.

CONCLUSION

The petition for a writ of certiorari should be granted.

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June 2011

AMICUS CURIAE BRIEF

No. 10-1195

In The
Supreme Court of the United States

MARCUS D. MIMS,
Petitioner,

v.

ARROW FINANCIAL SERVICES, LLC,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF NATIONAL CONSUMER LAW CENTER AND NATIONAL ASSOCIATION OF CONSUMER ADVOCATES AS AMICI CURIAE IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF *AMICI CURIAE*

The National Consumer Law Center (NCLC) is a national legal organization focusing on the legal needs of consumers, particularly low-income and elderly consumers. NCLC publishes the widely praised seventeen-volume *Consumer Credit and Sales Legal Practice Series*. Among the treatises in the Series is *Unfair and Deceptive Acts and Practices* (7th ed. 2008 and Supp.), and *Fair Debt Collection* (6th ed. 2008 and Supp.), which include coverage of the Telephone Consumer Protection Act (TCPA). NCLC's sole interest before the Court is enforcement of the TCPA to protect consumer privacy and prevent abusive and unlawful telephone debt collection as Congress intended.[1]

The National Association of Consumer Advocates (NACA) is a non-profit corporation whose members are private and public sector attorneys, legal services attorneys, law professors, and law students whose primary focus involves the protection and representation of consumers. NACA's mission is to promote justice for all consumers by maintaining a forum for information sharing among consumer advocates across the country and by serving as a voice for its members as well as consumers in the ongoing effort to curb unfair and abusive business practices. Compliance with federal consumer

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[1] In blanket letters of consent filed with the Clerk, the parties have consented to the filing of this brief *amici curia*. Pursuant to this Court's Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for a party and that no one other than *amici* made a monetary contribution to the preparation or submission of this brief.

protection laws in general and the TCPA in particular are a continuing concern of NACA.

SUMMARY OF ARGUMENT

Notwithstanding Congress's clearly stated intentions, extensive non-compliance by national and international telemarketing and related industries under the Telephone Consumer Protection Act, 47 U.S.C. § 227 (TCPA) is not at all uncommon. One reason for this unfortunate state of affairs is the failure of the TCPA's private right of action, § 227(b)(3), to provide the vigorous enforcement and effective deterrence mechanism that Congress envisioned when it adopted this law.

Effective public enforcement of the TCPA is virtually impossible given limited public resources, the scope of the problem, and the ever-expanding technology that drives the telemarketing industry. Accordingly, Congress relied on individual consumers who have been subjected to TCPA violations to police the industry. Congress therefore included in the TCPA facially robust private remedies with seemingly attractive financial incentives to achieve this goal. Unfortunately, this experiment to privatize law enforcement to date has been unsuccessful, in significant part because of the diversion of efforts to litigating the foundational issue of jurisdiction.

Even now, nearly 20 years after Congress enacted the TCPA, the federal courts are intractably split over the substantive and procedural complications caused by Congress's failure to explicitly (albeit unnecessarily) grant federal district

court jurisdiction to enforce the TCPA through private litigation. This disarray within the federal judiciary has itself become a focal point of the litigation, derailing the primary objective of effective law enforcement. *Amici* urge this Court to grant the petition for certiorari to provide the certainty that is now absent for consumers who wish to enforce their rights as well as to reduce the substantial peripheral litigation over the application of jurisdictional and substantive differences between federal and state law.

ARGUMENT

I. The Current Split Among The Circuits Is Profound And Irreconcilable

The petition for certiorari surveys the array of conflicting Circuit Court opinions and presents the compelling reasons to support the Court's granting the writ of certiorari under the first clause of Rule 10(a). Strikingly, just days after the submission of that petition, on April 4, 2011, the Third Circuit re-emphasized the fractured jurisdictional interpretations among the Circuits by issuing its opinion in *Landsman & Funk, PC v. Skinder-Strauss Associates*, ___ F.3d ___, 2011 WL 1226371 (3d Cir. 2011). *Landsman* generated three separate opinions from the three-judge panel: Judge Rendell concluded that federal courts may hear TCPA claims under federal diversity jurisdiction but not under federal question jurisdiction, adhering to Circuit precedent from her own majority opinion in *ErieNet, Inc. v. Velocity Net, Inc.*, 156 F.3d 513 (3d Cir. 1998); Judge McKee opined in his concurrence that both federal question and diversity jurisdiction applied, asserting

that *ErieNet* is no longer authoritative even within the Third Circuit because intervening jurisprudence established that the "Supreme Court has since vindicated Judge Alito's analytical approach" in his dissent in *ErieNet*; and Judge Garth, who had joined the majority in *ErieNet*, issued a dissent that persisted in denying any federal jurisdiction at all – under either federal question or diversity jurisdiction – to adjudicate claims under § 227(b)(3).

Landsman is a timely illustration of the split among the Circuits on the question presented. In addition, *Landsman* dramatically demonstrates the inconsistent intra-Circuit treatment of the federal question/diversity jurisdiction issues in other jurisdictions. *Compare Gottlieb v. Carnival Corp.*, 436 F.3d 335 (2d Cir. 2006) (finding TCPA diversity jurisdiction), with *Foxhall Realty Law Offices, Inc. v. Telecomms. Premium Servs., Ltd.*, 156 F.3d 432 (2d Cir. 1998) (finding no TCPA federal question jurisdiction). The positions and sub-positions among the Circuits are truly irreconcilable. Awaiting additional decisions from other federal courts will not resolve the questions or crystallize the issues. *Amici* accordingly urge the Court to grant review at this time and bring order to the chaos under which the federal courts and private litigants now labor.

II. This Unsettled Jurisprudence Has Impaired TCPA Enforcement While Aiding Industry Non-Compliance

A natural consequence of the disarray that is the hallmark of this TCPA jurisprudence has been to afford the telemarketing and debt collection industries abundant opportunities to obstruct

effective enforcement. Industry insiders have identified this jurisdictional quagmire as a defense tactic for its members who are subject to private enforcement. *See* Douglas B. Brown, "Class Actions Under the Federal Telephone Consumer Protection Act of 1991," Fed'n Def. & Corp. Couns. Q84, 89 (2010) ("Because circuits are split as to whether the TCPA grants federal or state jurisdiction over private claims, jurisdiction issues for class action claims under the TCPA should be carefully examined in every case."). Of course litigants cannot be faulted for taking advantage of all legitimate legal arguments that exist, particularly where as here each of the conflicting legal positions enjoys substantial support. The critical point is simply that the petition for certiorari now presents a paradigmatic situation where the Court's intervention is truly warranted.

American citizens and small businesses suffer the consequences of the increasing volume of TCPA abuse. No public agency has been given the means to redress the literally millions of junk faxes, robocalls, and unlawful cell phone contacts that intrude every day into the solitude of American consumers and companies, and no authority has allocated scarce federal or state resources sufficient to address a problem of such magnitude. Moreover, the inability of consumers to have their TCPA complaints adequately addressed before state regulatory commissions underscores the need for effective federal TCPA enforcement. *See e.g. Rubin v. Bell-Atlantic Pennsylvania*, 2001 Pa. PUC LEXIS 30 (although consumer established that he "received a series of phone calls which contained ethnic epithets as well as threats of physical violence

surrounding an alleged debt," sympathetic Public Utility Commission nevertheless dismissed customer's complaint); and *Dickson v. Verizon West Virginia, Inc.*, 2005 W. Va. PUC LEXIS 3046 (in recommended decision, Chief Administrative Law Judge notes that state Public Utility Commission is unable to award damages where customer alleged that telecommunications provider (as creditor) maliciously harassed customer, ruined his credit, and engaged debt collection agencies to collect a debt that he disputed).

Congress provided the tools and incentives to foster efficient and effective private enforcement by enacting § 227(b)(3):

> (3) Private right of action
>
> A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State--
>
> > (A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation,
> >
> > (B) an action to recover for actual monetary loss from such a violation, or to receive $500 in damages for each such violation, whichever is greater, or
> >
> > (C) both such actions.
>
> If the court finds that the defendant willfully or knowingly violated this subsection or the regulations prescribed under this subsection,

> the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph.
>
> 47 U.S.C. § 227(b)(3).

However, the TCPA jurisdictional morass has stymied this private enforcement mechanism. With public TCPA enforcement limited, the jurisdictional discouragement of private enforcement has blunted meaningful enforcement.

As to the substance of the question presented, *amici* submit that it seems improbable that Congress intended that private TCPA claims be actionable only in state courts. Under the current view of the majority of Circuits as reflected in the decision below, TCPA protections are available to consumers and others only on a state-by-state basis. However, *amici* are committed to the view that American consumers are entitled to equal and consistent treatment under federal law irrespective of their state of residence. Industry deserves the same. Differences in degrees of federal consumer protection based on state residency are unacceptable; that the TCPA's minimal standards of privacy are unenforceable now in at least two states – Maryland and Texas[2] – is a result that should attain only with the explicit and unambiguous Congressional approval that is lacking here.

Other indications that Congress did not intend that private TCPA claims be actionable only

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[2] *See* Petition for a Writ of Certiorari, pp. 11-12 n.5.

in state courts are found in the statute itself. First, § 227(f)(2) allows state attorneys general or other state designees to pursue in federal court the same $500/$1,500 claims on behalf of state residents as are available to private actors. Plainly, Congress did not deem the potentially small amounts at stake as a disqualification of federal court jurisdiction, as it concluded in 1980 when it removed the minimum amount in controversy requirement for all federal questions under 28 U.S.C. § 1331. Pub. L. 96-486, December 1, 1980, 94 Stat. 2369. Perhaps most significant, § 227(f)(2)'s grant of exclusive jurisdiction in federal district courts for actions brought by these state officials unmistakably shows Congress's awareness and willingness to invoke exclusive jurisdiction, yet it failed to invoke exclusive jurisdiction in § 227(b)(3). The proclivity of the court below to graft that exclusivity language into § 227(b)(3) under these circumstances when Congress itself chose not to do so improperly rewrites the TCPA. *See e.g. Lewis v. City of Chicago, Ill.*, __ U.S. ___, ___, 130 S. Ct. 2191, 2200 (2010) ("It is not for us to rewrite the statute so that it covers only what we think is necessary to achieve what we think Congress really intended.").

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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JOINT APPENDIX

RECORD
AND
BRIEFS

No. 10-1195

IN THE
Supreme Court of the United States

MARCUS D. MIMS,

Petitioner,

v.

ARROW FINANCIAL SERVICES, LLC,

Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Eleventh Circuit

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September 2011

PETITION FOR WRIT OF CERTIORARI FILED MAR. 30, 2011
CERTIORARI GRANTED JUNE 27, 2011

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General Docket
United States Court of Appeals for the Eleventh Circuit

Court of Appeals Docket #: 10-12077
Docketed: 05/06/2010
Nature of Suit: 3890 Other Statutory Actions
Termed: 11/30/2010
Marcus Mims v. Arrow Financial Services, LLC
Appeal From: Southern District of Florida
Fee Status: Fee Paid
Case Handler: Camp, Jan S., GG
Case type information:

1) Private Civil
2) Federal Question
3) –

Originating Court Information:

District: 113C-1 : 1:09-cv-22347-UU
Civil Proceeding: Ursula Ungaro, –, U.S. District Judge
Secondary Judge: Andrea Simonton, -, -
Date Filed: 08/07/2009
Date NOA Filed:
04/29/2010

Prior Cases:

None

Current Cases:

None

* * *

05/06/2010	CIVIL APPEAL DOCKETED. Notice of appeal filed by Appellant Marcus D. Mims on 04/29/2010. Appellant brief due 40 days from 05/06/2010. Fee Status: Fee Paid.
	* * *
07/19/2010	Appellant's Brief filed by Appellant Marcus D. Mims. Service date: 07/15/2010 by US mail – Attorney for Appellee: Sinsley.
07/19/2010	Record Excerpts filed by Appellant Marcus D. Mims. Service date: 07/15/2010 US mail – Attorney for Appellee: Sinsley.
	* * *
08/12/2010	Appellee's Brief filed by Appellee Arrow Financial Services, LLC. Service date: 08/11/2010 US mail – Attorney for Appellant: Yarbrough.
	* * *
08/27/2010	Record on Appeal filed. Record Part: Pleadings, No. of Volumes: 1
08/27/2010	Certificate of Readiness filed as to Appellant Marcus D. Mims.
11/30/2010	Opinion issued by court as to Appellant Marcus D. Mims. Decision: Affirmed. Opinion type: Non-Published. Opinion method: Per Curiam.
11/30/2010	Judgment entered as to Appellant Marcus D. Mims.
	* * *
01/24/2011	Mandate issued as to Appellant Marcus D. Mims. Record returned to the USDC's

	Clerk's Office: one volume of record on appeal.
02/24/2011	Extension for filing certiorari GRANTED by U.S. Supreme Court as to Appellant Marcus D. Mims to and including March 30, 2011.
04/01/2011	Notice of Writ of Certiorari filed as to Appellant Marcus D. Mims. SC# 10-1195.
06/27/2011	Writ of Certiorari filed as to Appellant Marcus D. Mims is GRANTED. SC# 10-1195.

U.S. District Court
Southern District of Florida (Miami)

CIVIL DOCKET FOR CASE #: 1:09-cv-22347-UU

Mims v. Arrow Financial Services, LLC

Assigned to: Judge Ursula Ungaro

Referred to: Magistrate Judge Andrea M. Simonton

Case in other court: 10-12077-GG

Cause: 15:1692 Fair Debt Collection Act

Date Filed: 08/07/2009

Date Terminated: 04/05/2010

Jury Demand: Plaintiff

Nature of Suit: 890 Other Statutory Actions

Jurisdiction: Federal Question

* * *

Date Filed	#	Docket Text
08/07/2009	1	COMPLAINT and jury demand against Arrow Financial Services, LLC. Filing fee $ 350.00 Receipt#: 547125, filed by Marcus D. Mims.(jmd) (Entered: 08/07/2009)

* * *

12/09/2009	11	NOTICE by Arrow Financial Services, LLC of Liability Admission on Counts I, II, III, IV, V & VI (Canter, Steven) (Entered: 12/09/2009)

* * *

02/17/2010	14	MOTION to Dismiss for Lack of Jurisdiction 1 Complaint by Arrow Financial Services, LLC. Responses due by 3/8/2010 (Attachments: # 1

Exhibit A - Plaintiff's Rule 26 Disclosure, # 2 Exhibit B - Defendant's letter to Plaintiff)(Canter, Steven) (Entered: 02/17/2010)

* * *

03/18/2010	23	RESPONSE in Opposition re 14 MOTION to Dismiss for Lack of Jurisdiction 1 Complaint MOTION to Dismiss for Lack of Jurisdiction 1 Complaint filed by Marcus D. Mims. (Yarbrough, Donald) (Entered: 03/18/2010)
03/24/2010	24	REPLY to Response to Motion re 14 MOTION to Dismiss for Lack of Jurisdiction 1 Complaint MOTION to Dismiss for Lack of Jurisdiction 1 Complaint filed by Arrow Financial Services, LLC. (Sinsley, Barbara) (Entered: 03/24/2010)

* * *

03/25/2010	26	Joint STIPULATION of Dismissal Partial by Arrow Financial Services, LLC, Marcus D. Mims (Attachments: # 1 Text of Proposed Order)(Yarbrough, Donald) Modified on 3/26/2010 (ls). (Entered: 03/25/2010)
04/05/2010	27	ORDER on 14 Motion to Dismiss for Lack of Jurisdiction. Signed by Judge Ursula Ungaro on 4/1/2010. (lh) (Entered: 04/05/2010)

04/05/2010	28	Administrative Order Closing Case. Signed by Judge Ursula Ungaro on 4/1/2010. (lh) (Entered: 04/05/2010)
04/29/2010	29	NOTICE OF APPEAL by Marcus D. Mims as to 27 Order on Motion to Dismiss/Lack of Jurisdiction Filing Fee $ 455.00, receipt number 549090. Within fourteen days of the filing date of a Notice of Appeal, the appellant must complete the Eleventh Circuit Transcript Order Form regardless of whether transcripts are being ordered [Pursuant to FRAP 10(b)]. For information go to our FLSD website under Transcript Information. (hh) (Entered: 04/29/2010)
04/29/2010		Transmission of Notice of Appeal and Docket Sheet to US Court of Appeals re 29 Notice of Appeal, (hh) (Entered: 04/29/2010)
		* * *
08/23/2010	34	Certified and Transmitted Record on Appeal to US Court of Appeals Consisting of (1) Volume of Pleadings re 29 Notice of Appeal, (hh) (Entered: 08/23/2010)
		* * *
01/31/2011	36	MANDATE of USCA (certified copy) AFFIRMING judgment/order of the district court as to 29 Notice of Appeal, filed by Marcus D. Mims; Date Issued: 1/24/11 ; USCA Case

		Number: 10-12077-GG (hh) (Entered: 01/31/2011)
02/01/2011	37	Appeal Record Returned from USCA (Miami/Records): Consisting of (1) Volume of Pleadings 29 Notice of Appeal, USCA # 10-12077-GG (hh) (Entered: 02/01/2011)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 09-CV-22347-Ungaro-Simonton

MARCUS D. MIMS,

Plaintiff,

v.

ARROW FINANCIAL SERVICES,LLC,

Defendant.

_____/

Filed by *VT* D.C.
Electronic
August 7, 2009
STEVEN M. LARIMORE
CLERK U.S. DIST. CT.
S.D. OF FLA. - MIAMI

COMPLAINT
JURY DEMAND

1. Plaintiff alleges violation of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 et seq. ("FDCPA"), the Florida Consumer Collection Practices Act, Fla. Stat. § 559.55 et seq. ("FCCPA"), and the Telephone Consumer Protection Act, 47 U.S.C § 227, et seq. ("TCPA").

JURISDICTION AND VENUE

2. This Court has jurisdiction under 28 U.S.C. §§ 1331, 1337 and 15 U.S.C. § 1692k. Venue in this District is proper because Plaintiff resides here and Defendant placed telephone calls into this District.

PARTIES

3. Plaintiff, MARCUS D. MIMS, is a natural person, and citizen of the State of Florida, residing in Miami-Dade County, Florida.

4. Defendant, ARROW FINANCIAL SERVICES, LLC, is a corporation and citizen of the State of Illi-

nois with its principal place of business at 5996 West Touhy Avenue, Niles, Illinois 60714.

5. Defendant regularly uses the mail and telephone in a business the principal purpose of which is the collection of debts.

6. Defendant regularly collects or attempts to collect debts for other parties.

7. Defendant is a "debt collector" as defined in the FDCPA.

8. Defendant was acting as a debt collector with respect to the collection of Plaintiff's alleged debt.

FACTUAL ALLEGATIONS

9. Defendant sought to collect from Plaintiff an alleged debt arising from transactions incurred for personal, family or household purposes.

10. Defendant left the following messages on Plaintiff's voice mail on his cellular telephone on or about the dates stated:

July 22, 2008

> This message is meant only for Marcus Mims and is about a personal business matter. If you are not Marcus Mims, do not listen to the rest of this message. By continuing to listen to this message, you acknowledge that you are Marcus Mims. Marcus Mims. The message is from _____ (inaudible) with Arrow Financial Services and is an attempt to collect a debt. Please call us back at 866-447-0133, extension 2913. Federal law requires that we advise you that this communication is from a debt collector. Any information that you provide to us will be used for such purpose. Again this message is only for Marcus

Mims. Please call me at 866-447-0133, extension 2913. Thank you.

July 24, 2008

This message is meant only for Marcus Mims and is about a personal business matter. If you are not Marcus Mims, do not listen to the rest of this message. By continuing to listen to this message, you acknowledge that you are Marcus Mims. Marcus Mims. The message is from Allan _____ (inaudible) with Arrow Financial Services and is an attempt to collect a debt. Please call us back at 866-447-0133, extension 3628. Federal law requires that we advise you that this communication is from a debt collector. Any information that you provide to us will be used for such purpose. Again this message is only for Marcus Mims. Please call me at 866-447-0133, extension 3628. Thank you.

July 25, 2008

This message is for Marcus Mims. Please call me as soon as possible at 888-pause-822-pause-9559. Again please call me back at 888-pause-822-pause-9559. Thank you.

July 29, 2008

This message is for Marcus Mims. Please call me as soon as possible at 888-pause-822-pause-9559. Again please call me back at 888-pause-822-pause-9559. Thank you.

August 7, 2008

This message is for Marcus Mims. Please call me as soon as possible at 888-pause-822-pause-9559. Again please call me back at 888-pause-822-pause-9559. Thank you.

August 8, 2008

This message is for Marcus Mims. Please call me as soon as possible at 888-pause-822-pause-9559. Again please call me back at 888-pause-822-pause-9559. Thank you.

August 9, 2008

This message is for Marcus Mims. Please call me as soon as possible at 888-pause-822-pause-9559. Again please call me back at 888-pause-822-pause-9559. Thank you.

August 14, 2008

This message is meant only for Marcus Mims and is about a personal business matter. If you are not Marcus Mims, do not listen to the rest of this message. By continuing to listen to this message, you acknowledge that you are Marcus Mims. Marcus Mims. The message is from _____ (inaudible) with Arrow Financial Services and is an attempt to collect a debt. Please call us back at 866-447-0133, extension 2947. Federal law requires that we advise you that this communication is from a debt collector. Any information that you provide to us will be used for such purpose. Again this message is only for Marcus Mims. Please call me at 866-447-0133, extension 2947. Thank you.

September 4, 2008

This message is meant only for Marcus Mims and is about a personal business matter. If you are not Marcus Mims, do not listen to the rest of this message. By continuing to listen to this message, you acknowledge that you are Marcus Mims. Marcus Mims, the message is from Daniel

Bartaloan with Arrow Financial Services, and is an attempt to collect a debt. Please call us back at 866-261-4907, extension 3046. Federal law requires that we advise you that this communication is from a debt collector. Any information that you provide to us will be used for such purpose. Again, this message is only for Marcus Mims. Please call me at 866-261-4907, extension 3046. Thank you.

September 5, 2008

This message is meant only for Marcus Mims and is about a personal business matter. If you are not Marcus Mims, do not listen to the rest of this message. By continuing to listen to this message, you acknowledge that you are Marcus Mims. Marcus Mims, the message is from Daniel Bartaloan with Arrow Financial Services, and is an attempt to collect a debt. Please call us back at 866-261-4907, extension 3046. Federal law requires that we advise you that this communication is from a debt collector. Any information that you provide to us will be used for such purpose. Again, this message is only for Marcus Mims. Please call me at 866-261-4907, extension 3046. Thank you.

September 9, 2008

This message is meant only for Marcus Mims and it's about a personal business matter. If you are not Mr. Mims, do not listen to the rest of this message. By continuing to listen to this message, you acknowledge that you are Mr. Mims. Mr. Mims, the message is from Monica Henry, and I am calling from Arrow Financial Services, and it's about a past due debt. Please contact me here

in the office today at area code 877-275-5046. Federal law requires that we advise you that this communication is from a debt collector, and it's an attempt to collect a debt. Any information that you provide to us will be used for such purpose. Again, this message is only for Marcus Mims. Mr. Mims, contact me in the office today at area code 877-275-5046, at extension 192185. Thank you.

September 26, 2008

To collect a debt. Please call us back at 866-261-4907, extension 3044. Federal law requires that we advise you that this communication is from a debt collector. Any information that you provide to use will be used for such purpose. Again, this message is only for Marcus Mims. Please call me at 866-261-4907, extension 3044. Thank you.

11. Defendant left similar or identical messages on other occasions. (Collectively, "the telephone messages").

12. The messages are "communications" as defined by 15 U.S.C. § 1692a(2). See *Berg v. Merchs. Ass'n Collection Div.*, Case No. 08-60660-Civ-Dimitrouleas/Rosenbaum, 2008 U.S. Dist. LEXIS 94023 (S.D. Fla. Oct. 31, 2008).

13. Defendant failed to inform Plaintiff in some of the messages that the communication was from a debt collector, failed to inform the Plaintiff of its name and failed to disclose the purpose of Defendant's messages.

14. Defendant knew it was required to disclose its name, that it is a debt collector and the purpose of its communication in telephone messages to Plaintiff.

15. Defendant used an automatic telephone dialing system or a pre-recorded or artificial voice to place numerous telephone calls to Plaintiff's cellular telephone.

16. Plaintiff did not expressly consent to Defendant's placement of telephone calls to Plaintiff's cellular telephone by the use of an automatic telephone dialing system or a pre-recorded or artificial voice prior to Defendant's placement of the calls.

17. None of Defendant's telephone calls placed to Plaintiff were for "emergency purposes" as specified in 47 U.S.C § 227 (b)(1)(A).

18. Defendant willfully or knowingly violated the TCPA.

COUNT I
FAILURE TO DISCLOSE STATUS AS DEBT COLLECTOR

19. Plaintiff incorporates Paragraphs 1 through 18.

20. Defendant failed to disclose in the telephone messages that it is a debt collector in violation of 15 U.S.C. § 1692e(11). See *Foti v. NCO Fin. Sys.*, 424 F. Supp. 2d 643, 646 (D.N.Y. 2006) and *Belin v. Litton Loan Servicing*, 2006 U.S. Dist. LEXIS 47953 (M.D. Fla. 2006) and *Leyse v. Corporate Collection Servs.*, 2006 U.S. Dist. LEXIS 67719 (D.N.Y. 2006).

WHEREFORE, Plaintiff requests that the Court enter judgment in favor of Plaintiff and against Defendant for:

a. Damages;

b. Attorney's fees, litigation expenses and costs of suit; and

c. Such other or further relief as the Court deems proper.

COUNT II
FAILURE TO MAKE MEANINGFUL DISCLOSURE OF IDENTITY

21. Plaintiff incorporates Paragraphs 1 through 18.

22. Defendant placed telephone calls to Plaintiff without making meaningful disclosure of its identity when it failed to disclose its name and or that it is a debt collector and the purpose of Defendant's communication in the telephone messages in violation of 15 U.S.C § 1692d(6). See *Valencia v The Affiliated Group, Inc.*, Case No. 07-61381-Civ-Marra/Johnson, 2008 U. S. Dist. LEXIS 73008, (S.D. Fla., September 23, 2008); *Wright v. Credit Bureau of Georgia, Inc.*, 548 F. Supp. 591, 593 (D. Ga. 1982); and *Hosseinzadeh v. M.R.S. Assocs.*, 387 F. Supp. 2d 1104 (D. Cal. 2005).

WHEREFORE, Plaintiff requests that the Court enter judgment in favor of Plaintiff and against Defendant for:

a. Damages;

b. Attorney's fees, litigation expenses and costs of suit; and

c. Such other or further relief as the Court deems proper.

COUNT III
EXCESSIVE CALLING IN VIOLATION OF THE FAIR DEBT COLLECTION PRACTICES ACT

23. Plaintiff incorporates Paragraphs 1 through 18.

24. Defendant caused Plaintiff's telephone to ring repeatedly or continuously with the intent to annoy,

abuse or harass in violation of 15 U.S.C §1692d(5). See *Sanchez v. Client Servs.*, 520 F. Supp. 2d 1149, 1160-1161 (N.D. Cal. 2007).

WHEREFORE, Plaintiff requests that the Court enter judgment in favor of Plaintiff and against Defendant for:

a. Damages;

b. Attorney's fees, litigation expenses and costs of suit; and

c. Such other or further relief as the Court deems proper.

COUNT IV
TELEPHONIC HARASSMENT AND ABUSE FOR UNAUTHORIZED CALLS TO A CELLULAR TELEPHONE

25. Plaintiff incorporates Paragraphs 1 through 18.

26. Defendant engaged in conduct the natural consequence of which is to harass, oppress, or abuse by using an automatic telephone dialing system or prerecorded or artificial voice in placing telephone calls to Plaintiff's cellular telephone to which Plaintiff had not consented, in violation of 15 U.S.C § 1692d.

WHEREFORE, Plaintiff requests that the Court enter judgment in favor of Plaintiff and against Defendant for:

a. Damages;

b. Attorney's fees, litigation expenses and costs of suit; and

c. Such other or further relief as the Court deems proper.

COUNT V
ILLEGAL COLLECTION TECHNIQUES IN VIOLATION OF THE FLORIDA CONSUMER COLLECTION PRACTICES ACT

27. Plaintiff incorporates Paragraphs 1 through 18.

28. Defendant asserted the right to collect a debt by leaving telephone messages for Plaintiff without disclosing its name, that it is a debt collector and the purpose of its communications, by using an automatic telephone dialing system or pre-recorded or artificial voice in placing calls to Plaintiff's cellular telephone to which Plaintiff had not consented, and by telephoning Plaintiff with such frequency as can be reasonably be expected to harass, all done when Defendant knew it did not have a legal right to use such collection techniques in violation of Fla. Stat. § 559.72(9).

WHEREFORE, Plaintiff requests that the Court enter judgment in favor of Plaintiff and against Defendant for:

a. Damages;

b. Attorney's fees, litigation expenses and costs of suit; and

c. Such other or further relief as the Court deems proper.

COUNT VI
HARASSMENT IN VIOLATION OF THE FLORIDA CONSUMER COLLECTION PRACTICES ACT

29. Plaintiff incorporates Paragraphs 1 through 18.

30. By failing to disclose its name, that it is a debt collector and the purpose of its communication, by using an automatic telephone dialing system or pre-

recorded or artificial voice in placing telephone calls to Plaintiff's cellular telephone to which Plaintiff had not consented, and by telephoning Plaintiff with such frequency as can be reasonably be expected to harass, Defendant willfully engaged in conduct the natural consequence of which is to harass in violation of Fla. Stat. § 559.72(7).

WHEREFORE, Plaintiff requests that the Court enter judgment in favor of Plaintiff and against Defendant for:

a. Damages;

b. Attorney's fees, litigation expenses and costs of suit; and

c. Such other or further relief as the Court deems proper.

COUNT VII
VIOLATION OF THE TELEPHONE CONSUMER PROTECTION ACT

31. Plaintiff incorporates Paragraphs 1 through 18.

32. Defendant placed non-emergency telephone calls to Plaintiff's cellular telephone using an automatic telephone dialing system or pre-recorded or artificial voice without Plaintiff's prior express consent in violation of 47 U.S.C § 227(b)(1)(A)(iii).

WHEREFORE, Plaintiff requests that the Court enter judgment in favor of Plaintiff and against Defendant for:

a. Damages; and

b. Such other or further relief as the Court deems proper.

COUNT VIII
DECLARATORY AND INJUNCTIVE RELIEF

33. Plaintiff incorporates Paragraphs 1 through 18.

34. Pursuant to 28 U.S.C §§2201 and 2202, Plaintiff seeks a declaration that Defendant's practices are in violation of the TCPA and the FCCPA.

35. The FCCPA provides for equitable relief including injunctive relief. *Berg v. Merchs. Ass'n Collection Div.*, 586 F. Supp. 2d 1336, 1345, (S.D. Fla. 2008).

36. Plaintiff seeks a permanent injunction prohibiting Defendant from continuing violation of the FCCPA.

37. Pursuant to 47 U.S.C § 227(c)(5)(A), Plaintiff seeks a permanent injunction prohibiting Defendant from continuing violation of the TCPA.

WHEREFORE, Plaintiff requests that the Court enter judgment:

a. declaring that Defendant's practices violate the TCPA and the FCCPA;

b. permanently injoining Defendant from engaging in the violative practices; and

c. Such other or further relief as the Court deems proper.

JURY DEMAND

Plaintiff demands trial by jury.

Dated this __7__ day of August, 2009.

DONALD A. YARBROUGH, ESQ.
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PETITIONER'S BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
SEP 13 2011
OFFICE OF THE CLERK

No. 10-1195

IN THE

Supreme Court of the United States

MARCUS D. MIMS,

Petitioner,

v.

ARROW FINANCIAL SERVICES, LLC,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR PETITIONER

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September 2011

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QUESTION PRESENTED

Did Congress divest the federal district courts of their federal-question jurisdiction under 28 U.S.C. § 1331 over private actions brought under the Telephone Consumer Protection Act, 47 U.S.C. § 227?

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INTRODUCTION

Since 1875, federal trial courts have been empowered by statute to adjudicate cases arising under federal law. That grant of jurisdiction, now embodied in 28 U.S.C. § 1331, embraces "all civil actions arising under the Constitution, laws or treaties of the United States." Section 1331 authorizes federal district courts to hear cases falling within that description except where Congress has, in some more specific statute, disabled the courts from exercising jurisdiction over a particular type of action otherwise within the scope of the statutory grant.

At the core of the district courts' federal-question jurisdiction under § 1331 are actions in which a plaintiff asserts "a cause of action created by federal law." *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 312 (2005). This case fits that description precisely: The plaintiff, petitioner Marcus Mims, asserts a federal statutory claim for damages and injunctive relief created by the Telephone Consumer Protection Act (TCPA), Pub. L. No. 102-243, 105 Stat. 2394 (1991), *codified as amended at* 47 U.S.C. § 227. The question posed by the case is whether the TCPA forecloses the invocation of federal-question jurisdiction because it provides that the right of action it creates "may" be brought in state courts that are empowered to hear such claims. 47 U.S.C. § 227(b)(3). The lower courts' holding that the TCPA strips the federal district courts of their jurisdiction under § 1331 is contrary to well-established principles of statutory construction teaching that a permissive grant of authority to one set of courts does not choke off access to another set of courts under an otherwise available grant of jurisdiction.

OPINIONS BELOW

The per curiam opinion of the United States Court of Appeals for the Eleventh Circuit is unreported and is reproduced in the Appendix to the Petition for Certiorari (Pet. App.) at 1a. The order of the United States District Court for the Southern District of Florida dismissing the complaint is unreported and is reproduced at Pet. App. 4a.

JURISDICTION

Petitioner Mims invoked the jurisdiction of the district court under 28 U.S.C. §§ 1331 and 1337 on the ground that this action arises under a law of the United States—specifically, 47 U.S.C. § 227(b)(3), which creates a private right of action for actual and statutory damages and injunctive relief for violations of the TCPA. The district court's final order dismissing the complaint in its entirety for lack of subject-matter jurisdiction was entered on April 4, 2010. The court of appeals had jurisdiction over Mr. Mims's timely appeal, noticed April 29, 2010, under 28 U.S.C. § 1291.

The court of appeals affirmed the district court's dismissal of the action in a per curiam opinion dated November 30, 2010. On February 22, 2011, Justice Thomas granted a timely request for an extension of time, to and including March 30, 2011, to file a petition for a writ of certiorari. Mr. Mims filed his petitioner for a writ of certiorari on March 30, 2011. This Court granted the petition on June 27, 2011, and has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The federal-question jurisdictional statute, 28 U.S.C. § 1331, provides:

> **§ 1331. Federal question.**
>
> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States.

The operative provisions of the TCPA, codified at 47 U.S.C. § 227, together with the congressional findings set forth in § 2 of the TCPA (105 Stat. 2394-95, 47 U.S.C. § 227 note), are reprinted in their entirety in the appendix to this brief. The portion of the TCPA at issue here, 47 U.S.C. § 227(b)(3), provides:

> **(3) Private right of action**
>
> A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State—
>
> (A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation,
>
> (B) an action to recover for actual monetary loss from such a violation, or to receive $500 in damages for each such violation, whichever is greater, or
>
> (C) both such actions.
>
> If the court finds that the defendant willfully or knowingly violated this subsection or the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph.

STATEMENT OF THE CASE

A. The Telephone Consumer Protection Act.

Advances in telecommunications technology have provided tremendous benefits to our society. But those benefits are not cost-free. New technologies have often brought with them new ways to intrude on individual privacy and waste the time and money of consumers and businesses alike. The latter years of the last century brought an explosion of abuses of telephone and telecopier technology, including the use of autodialers to clog telephone lines with unwanted calls, "robocalls" that leave unsolicited, prerecorded messages, and "junk faxes" that consume the recipients' paper and ink and interfere with the transmission of legitimate messages.

In 1991, Congress responded to these abuses by passing the TCPA. In enacting the TCPA, Congress made findings that telemarketing had become "pervasive due to the increased use of cost-effective telemarketing techniques." TCPA § 2(1). Congress further found that "[u]nrestricted telemarketing ... can be an intrusive invasion of privacy and, when an emergency or medical assistance telephone line is seized, a risk to public safety," and that "[m]any consumers are outraged over the proliferation of intrusive, nuisance calls to their homes from telemarketers." *Id.* §§ 2(5) & (6). "[R]esidential telephone subscribers consider automated or prerecorded telephone calls, regardless of the content or the initiator of the message, to be a nuisance and an invasion of privacy." *Id.* § 2(10). Although many states had enacted restrictions on such practices, Congress found that "telemarketers can evade their prohibitions through interstate opera-

tions; therefore, Federal law is needed to control residential telemarketing practices." *Id.* § 2(7).

The TCPA's findings also reflect Congress's conclusion that "[i]ndividuals' privacy rights, public safety interests, and commercial freedoms of speech and trade must be balanced in a way that protects the privacy of individuals and permits legitimate telemarketing practices." *Id.* § 2(9). Because most individuals have no practical way to avoid unwanted calls and faxes themselves, Congress found that "[b]anning such automated or prerecorded telephone calls to the home, except when the receiving party consents to receiving the call or when such calls are necessary in an emergency situation affecting the health and safety of the consumer, is the only effective means of protecting telephone consumers from this nuisance and privacy invasion." *Id.* § 2(12). In addition, Congress found that "[b]usinesses also have complained to the Congress and the Federal Communications Commission [(FCC)] that automated or prerecorded telephone calls are a nuisance, are an invasion of privacy, and interfere with interstate commerce." *Id.* § 2(14). In light of these concerns, Congress found that the FCC needed regulatory authority both to fine-tune the protections Congress was granting to consumers and to consider extending similar protections to businesses. *Id.* §§ 2(13) & (15).

The operative provisions of the TCPA are codified, as amended, in 47 U.S.C. § 227. The critical substantive provisions of the statute outlaw four specific types of practices: (1) making calls using automatic dialing equipment, prerecorded messages, or artificial voices to emergency telephone lines, rooms in hospitals and similar facilities, mobile phones and similar

devices, or any service for which the receiving party is charged for an incoming call; (2) making nonemergency calls using prerecorded messages or artificial voices to residential phone lines (absent prior consent); (3) sending unsolicited advertisements to facsimile machines (absent a preexisting business relationship between sender and receiver); and (4) using autodialers to tie up multiple telephone lines of a commercial establishment. 47 U.S.C. § 227(b)(1). The statute also provides regulatory authority to the FCC to extend protection against unwanted calls to businesses, as well as to exempt certain calls from the statute's prohibitions. 47 U.S.C. § 227(b)(2). And the law authorizes the FCC to establish, by regulation, "do not call" protection for residential telephone subscribers who wish to avoid commercial solicitation calls. 47 U.S.C. § 227(c).[1]

The TCPA provides several complementary means of enforcing its substantive provisions. It allows state attorneys general to bring actions to remedy a pattern or practice of violations, and provides that such actions may result in both injunctive relief and the recovery of statutory damages on behalf of individuals who received calls or faxes in violation of the statute. 47 U.S.C. § 227(f)(1). The Act explicitly provides that

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[1] In addition, the TCPA requires that all faxes show the date and time of transmission and identify the sender (and the sender's fax or telephone number). 47 U.S.C. § 227(d)(1)(B). And it authorizes the FCC to establish, by regulation, additional "technical and procedural standards" for fax transmissions and telephone calls with prerecorded messages, including requirements that prerecorded messages identify the caller and that they release the line of the person being called within five seconds after she hangs up. *Id.* §§ 227(d)(2) & (3).

the federal district courts "shall have exclusive jurisdiction over all" such actions. *Id.* § 227(f)(2). The TCPA provides for FCC participation in actions brought by state attorneys general, *id.* § 227(f)(3), and it also contemplates independent enforcement actions by the FCC, which, during their pendency, foreclose the filing of any state attorney general action based on the same violations, *id.* § 227(f)(7).

Of most importance here, the TCPA also creates a private right of action to enforce its terms. Subsection (b) of § 227, after setting forth the basic prohibitions applicable to autodialers, recorded messages, and junk faxes (and providing supplemental regulatory authority to the FCC), provides that in the case of a violation of any of those prohibitions (or any implementing regulation issued by the FCC), the victim may bring an action seeking injunctive relief and/or actual or statutory damages of $500 per violation (or up to $1500 per violation in the case of willful or knowing violations). 47 U.S.C. § 227(b)(3). The provision states that such an action "may, if otherwise permitted by the laws or rules of court of a State," be brought "in an appropriate court of that State," *id.*, but does not explicitly address jurisdiction of the federal courts or say that state-court jurisdiction is exclusive.[2]

Since the TCPA's enactment, the federal courts of appeals have been divided on whether federal district courts may exercise federal-question jurisdiction under 28 U.S.C. § 1331 over actions under § 227(b)(3). Panels of six circuits have held that federal-question

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[2] Section 227(c)(5) uses similar language to provide a right of action to victims of violations of the "do not call" regulations authorized by the TCPA.

jurisdiction is unavailable. *Int'l Sci. & Tech. Inst. v. Inacom Commc'ns, Inc.*, 106 F.3d 1146, 1158 (4th Cir. 1997); *Chair King, Inc. v. Houston Cellular Corp.*, 131 F.3d 507, 514 (5th Cir. 1997); *Nicholson v. Hooters of Augusta, Inc.*, 136 F.3d 1287, 1289 (11th Cir. 1998), *modified*, 140 F.3d 898 (11th Cir. 1998); *Foxhall Realty Law Offices, Inc. v. Telecomms. Premium Servs., Ltd.*, 156 F.3d 432, 435 (2d Cir. 1998); *ErieNet, Inc. v. Velocity Net, Inc.*, 156 F.3d 513, 519 (3d Cir. 1998); *Murphey v. Lanier*, 204 F.3d 911, 915 (9th Cir. 2000).

Two circuits, by contrast, have held that § 227(b)(3) does not divest the federal district courts of the jurisdiction otherwise provided by § 1331 to hear "all civil actions arising under the ... laws ... of the United States." *See Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446 (7th Cir. 2005) (Posner, J.); *Charvat v. Echostar Satellite LLC*, 630 F.3d 459 (6th Cir. 2010) (Sutton, J.); *see also ErieNet*, 156 F.3d at 521 (Alito, J., dissenting). Recently, a panel of the Third Circuit divided three ways on the jurisdictional consequences of § 227(b)(3), leading that court to grant en banc rehearing. *Landsman & Funk PC v. Skinder-Strauss Assocs.*, 640 F.3d 72 (3d Cir. 2011), *reh'g en banc granted*, __ F.3d __, 2011 WL 1879624 (May 17, 2011).

In contrast to their disagreement over federal-question jurisdiction, those courts of appeals that have addressed the issue thus far have agreed that the TCPA does not bar the courts from exercising diversity jurisdiction over TCPA claims under 28 U.S.C. § 1332. *See, e.g., Gottlieb v. Carnival Corp.*, 436 F.3d 335 (2d Cir. 2006) (Sotomayor, J.).

B. The Proceedings in This Case.

This case began after petitioner Marcus Mims received a series of telephone calls on his cell phone from respondent Arrow Financial Services, in connection with efforts by Arrow Financial to collect a debt said to be owed by Mr. Mims. *See* JA 9-13. Alleging that the calls were made using an automated dialer, prerecorded message, or artificial voice, and that he had not consented to receive such calls, JA 14, Mr. Mims filed suit against Arrow in the United States District Court for the Southern District of Florida, alleging violations of the TCPA. *See* JA 8, 18-19.

Because Mr. Mims's complaint invoked the district court's federal-question jurisdiction under 28 U.S.C. §§ 1331 and 1337, Arrow Financial, relying on Eleventh Circuit precedent denying such jurisdiction over TCPA claims, moved to dismiss for lack of subject-matter jurisdiction. *See Nicholson*, 136 F.3d 1287.[3] The district court, following *Nicholson*, entered a final order dismissing the TCPA claim for lack of subject-matter jurisdiction. Pet. App. 4a, JA 5-6, DEs 27-28. Mr. Mims appealed, and the Eleventh Circuit af-

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[3] Mr. Mims's complaint also asserted claims under the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. §§ 1692d & 1692e, for which jurisdiction would have been available under 15 U.S.C. § 1692k and 28 U.S.C. § 1331. *See* JA 8, 14-16. Arrow Financial conceded liability on these claims, undertook to satisfy them in full, and moved to dismiss them for lack of a case or controversy. *See* JA 4, DEs 11 & 14. The FDCPA claims were later settled and dismissed by stipulation. *See* JA 5, DE 26. The question presented here does not include whether the FDCPA claims' presence in the complaint would have given the district court jurisdiction over the TCPA claim through supplemental jurisdiction under 28 U.S.C. § 1367.

firmed in a short per curiam opinion citing its earlier decision in *Nicholson*. Pet. App. 1a.

SUMMARY OF ARGUMENT

The general federal-question jurisdiction statute, 28 U.S.C. § 1331, provides the federal courts with broad jurisdiction over all civil actions arising under federal law. However uncertain the outer limits of that jurisdiction may be, over a century of expansion of statutory federal-question jurisdiction has made one thing clear: When federal law creates a right of action and provides the substantive rules of decision for that action, the claim arises under federal law. *Grable & Sons*, 545 U.S. at 312. When such a claim is asserted, § 1331 provides the federal district courts with jurisdiction unless Congress has, by statute, divested them of it. *Verizon Md., Inc. v. Pub. Serv. Comm'n*, 535 U.S. 635, 642-43 (2002).

The TCPA, without doubt, is a federal law that both creates a right of action and provides the detailed substantive standards that decide it. Section 1331 thus provides jurisdiction unless Congress has, by statute, withdrawn it. Nothing in the TCPA's language indicates an intent to divest the courts of their jurisdiction under § 1331: The TCPA permits state courts to exercise jurisdiction over private TCPA claims (under specified conditions), but the relevant provision says nothing at all about whether federal courts may do so. As this Court has long held, "the grant of jurisdiction to one court does not, of itself, imply that the jurisdiction is to be exclusive." *United States v. Bank of N.Y. & Trust Co.*, 296 U.S. 463, 479 (1936). That principle, as more recently applied in such cases as *Tafflin v. Levitt*, 493 U.S. 455 (1990),

forecloses any reading of the TCPA's text as an ouster of otherwise available jurisdiction.

Moreover, reading the TCPA to preclude § 1331 jurisdiction is not necessary to give effect to its reference to state-court jurisdiction. Although state courts would likely be able to exercise jurisdiction even absent such language, the statute's reference to state-court proceedings is not superfluous. Rather, it eliminates any possibility that the statute could be read to make *federal* jurisdiction over private actions exclusive, as it is for actions brought by state attorneys general. And by providing that state courts must entertain TCPA actions if state laws and rules of court "otherwise permit[]," 47 U.S.C. § 227(b)(3), the TCPA's language also serves to substitute a statutory standard for the court-made rule of *Testa v. Katt*, 330 U.S. 386 (1947), that a state may not discriminate against federal causes of action.

Finally, and contrary to the suggestion of some lower courts that have rejected federal jurisdiction, the TCPA serves important federal interests identified by Congress: protecting individuals against invasions of privacy and other costs associated with unwanted telemarketing, and balancing the competing interests of telemarketers. Denying a federal forum under § 1331 would impair those interests by potentially making the availability of the remedies prescribed by Congress dependent on the grace of the state courts and/or the accident of diversity of citizenship, neither of which is likely to have been intended by the Congress that created the TCPA to combat telemarketing abuses and provide effective remedies against them.

ARGUMENT

I. An Action Under the TCPA Falls Within Section 1331's Grant of Federal Jurisdiction Over Cases Arising Under Federal Law.

A. Congress Has Conferred Broad Federal-Question Jurisdiction on the Federal District Courts.

Article III of the Constitution provides that the "judicial Power" of the United States extends to cases "arising under this Constitution, the laws of the United States, and Treaties made, or which shall be made, under their Authority." Article III empowers Congress to "confer on the federal courts jurisdiction over any case or controversy that might call for the application of federal law." *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 492 (1983) (citing *Osborn v. Bank of the United States*, 22 U.S. 738 (1824)). The statutory grant of federal-question jurisdiction in 28 U.S.C. § 1331 tracks the constitutional language by giving the district courts jurisdiction over "all civil actions arising under the Constitution, laws or treaties of the United States." Although this Court has not read the statute as conferring jurisdiction over the full range of federal-question cases that the Constitution might permit, *see Verlinden*, 461 U.S. at 494-95, the Court has recognized that § 1331 was intended to, and does, "provide a broad jurisdictional grant to the federal courts." *Powell v. McCormack*, 395 U.S. 486, 515 (1969).

The last century and a half have seen the steady rise to ascendancy of statutory federal-question jurisdiction. By contrast, for most of the first century following ratification of the Constitution, Congress had

conferred broad diversity and admiralty jurisdiction on the federal trial courts but granted them original or removal jurisdiction over only a relatively narrow slice of cases involving federal questions. For the most part, those cases involved particular parties whose litigation implicated issues of federal law (such as national banks or federal officers) or specific subject-matters (such as cases involving import, tax, and postal laws, cases brought under laws regulating the slave trade, patent and copyright cases, and, in the aftermath of the Civil War, cases arising under the new federal civil-rights statutes). *See, e.g.*, Rev. Stat. §§ 563, 629, 643, 644 (2d ed. 1878) (compiling jurisdictional provisions extant as of 1874).

That state of affairs changed significantly in 1875, when Congress gave the federal circuit courts (the principal federal trial courts of the day) jurisdiction over all civil suits "arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority," provided the amount in controversy exceeded $500. Jurisdiction & Removal Act of 1875, ch. 137, § 1, 18 Stat. 470. As this Court has said,

> By that statute "... Congress gave the federal courts the vast range of power which had lain dormant in the Constitution since 1789. These courts ceased to be restricted tribunals of fair dealing between citizens of different states and became the *primary* and powerful reliances for vindicating every right given by the Constitution, the laws, and treaties of the United States."

Zwickler v. Koota, 389 U.S. 241, 256 (1967) (quoting Frankfurter & Landis, *The Business of the Supreme*

Court: A Study in the Federal Judicial System 65 (1928) (emphasis added by Court)).

The 1875 Act's grant of jurisdiction over federal-question cases was the direct ancestor of the one now found in 28 U.S.C. § 1331. That jurisdictional grant transferred to the federal district courts (with an increase in the required amount in controversy to $3,000) when the circuit courts were abolished in 1911. Judicial Code of 1911, § 24(1), 36 Stat. 1087. Simultaneously, Congress further expanded federal-question jurisdiction by giving the district courts jurisdiction over "all suits and proceedings arising under any law regulating commerce," without regard to amount in controversy—the forerunner of today's 28 U.S.C. § 1337. Judicial Code of 1911, § 24(8).

When Title 28 of the United States Code was enacted into law in 1948, the major heads of federal district court jurisdiction that had been combined in § 24 of the Judicial Code of 1911 were placed in separate sections. The grant of general federal-question jurisdiction became § 1331. It was substantively unchanged, although the wording of the basic jurisdictional grant was simplified to its present form, covering all cases "arising under the Constitution, laws or treaties of the United States" that satisfied the amount-in-controversy requirement, which remained at $3,000. Act of June 25, 1948, ch. 646, 62 Stat. 930. At the same time, the parallel grant of jurisdiction over cases arising under federal laws regulating commerce (without regard to amount in controversy) became 28 U.S.C. § 1337.

In 1958, Congress raised § 1331's jurisdictional amount to $10,000, together with the amount-in-controversy requirement for diversity cases, which

§ 1331's jurisdictional amount had paralleled since 1875. The increase reflected Congress's desire to keep small-value *diversity* cases out of the federal courts, not an intent to significantly limit federal-question jurisdiction, which Congress anticipated would be largely unaffected by the change. *See* 13D Wright, Miller, *et al.*, *Federal Practice & Procedure* § 3561.1 (3d ed. 2011). In 1976, Congress moved § 1331 decidedly in the opposite direction from diversity jurisdiction by eliminating § 1331's jurisdictional amount requirement for cases involving challenges to federal agency actions. Pub. L. No. 94-574, § 2, 90 Stat 2721. The 1976 legislation was intended to eliminate "an unfortunate gap in the statutory jurisdiction of the Federal courts," which resulted in "denial to litigants of a Federal forum for Federal claims considered incapable of dollars and cents valuation or too small in monetary amount." H.R. Rep. No. 94-1656, at 12, 1976 U.S.C.C.A.N. 6121, 6134-45.

Section 1331 assumed its current form in 1980 with the complete elimination of the jurisdictional amount requirement. Federal Question Jurisdictional Amendments Act of 1980, Pub. L. No. 96-486, § 2(a), 94 Stat. 2369. The 1980 legislation completed the job of uncoupling federal-question jurisdiction from the amount-in-controversy requirement originally developed principally for diversity cases. The change reflected Congress's view that federal courts should have primary "responsibility [for] deciding all questions of federal law." H.R. Rep. No. 96-1461, at 1, 1980 U.S.C.C.A.N. 5063.[4]

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[4] The 1980 legislation left in place an amount-in-controversy requirement for one federal right of action, under the Consumer

(*Footnote continued*)

Thus, since 1980, § 1331 has provided a basis for federal district court jurisdiction generally applicable to all civil actions arising under federal law, without regard to amount in controversy. Section 1331 jurisdiction now subsumes the jurisdiction that was already available under § 1337, irrespective of amount in controversy, over cases arising under federal laws enacted pursuant to the Commerce Clause. *See* 13D Wright, Miller, *et al.*, *supra* § 3574.[5]

By contrast to this marked expansion of statutory federal-question jurisdiction, Congress has in recent decades cast conventional diversity jurisdiction (which was liberally granted in the early history of the republic) into relative disfavor, greatly increasing the amount-in-controversy requirement for diversity cases from $10,000 to $50,000 in 1988 and to $75,000 in 1996. *See* Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 201, 102 Stat. 4642 (1988); Federal Courts Improvement Act, Pub. L. No. 104-317, § 205, 110 Stat. 3847, 3850 (1996).

Product Safety Act, by amending that Act to provide a right of action only for claims involving damages greater than $10,000. *See* 15 U.S.C. § 2072(a).

[5] Section 1337 was amended in 1978 to add an amount-in-controversy requirement applicable to one specific type of case that had "led to a deluge of cases seeking small sums," *id.*—cases under the "Carmack Amendment," 49 U.S.C. §§ 11706, 14706, which allows shippers to sue interstate freight carriers for loss of or damage to articles shipped. In terms applicable to § 1331 as well as § 1337, the amendment provides that district courts may exercise original jurisdiction over a Carmack Amendment claim only if the amount in controversy exceeds $10,000. *See* Pub. L. No. 95-486, § 9, 92 Stat. 1629, *codified at* 28 U.S.C. § 1337(a).

B. Section 1331 Provides Jurisdiction Over Cases Asserting Rights of Action Created and Governed by Federal Law.

Both the wording of the statutory grant of federal-question jurisdiction, which closely follows that of Article III, and the sparse legislative history of its original 1875 enactment, suggest that Congress "meant to 'confer the whole power which the Constitution conferred'" over federal-question cases. *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 8 n.8 (1983) (quoting 2 Cong. Rec. 4986 (1874) (Sen. Carpenter)); *see also* Mishkin, *The Federal "Question" in the District Courts*, 53 Colum. L. Rev. 157, 160 & n.22 (1953). This Court, however, has long construed the statute to confer something less than the full Article III judicial power to hear federal-question cases. *See Verlinden*, 461 U.S. at 494-95; *Powell*, 395 U.S. at 515-16; *Zwickler*, 389 U.S. at 246 n.8; *Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354, 379 (1959).

The Court has refrained from "stating a 'single, precise, all-embracing' test" to define the full extent of jurisdiction under § 1331. *Grable*, 545 U.S. at 314 (quoting *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 821 (1988) (Stevens, J., concurring)). But however uncertain the *outer* bounds of § 1331 may be, there is no uncertainty about its core: A claim arises under federal law for purposes of § 1331 if federal law creates the right of action and provides the rules of decision that govern the merits of the claim. As Justice Holmes famously stated in *American Well Works Co. v. Layne & Bowler Co.*, "[a] suit arises under the law that creates the cause of action." 241 U.S. 257, 260 (1916). Subsequent decisions of this Court have explained that this principle is more suited to

describing those claims that necessarily satisfy § 1331 than to identifying those that do not—that is, it is "'more useful for inclusion than for ... exclusion.'" *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 809 n.5 (1986) (quoting *T.B. Harms Co. v. Eliscu*, 339 F.2d 823, 827 (2d Cir. 1964) (Friendly, J.)). Thus, "[t]he 'vast majority' of cases that come within this grant of jurisdiction" are "those in which federal law creates the cause of action." *Id.* at 808 (quoting *Franchise Tax Bd.*, 463 U.S. at 8-9). In other words, though not always *necessary* for federal jurisdiction, "a federal cause of action [is] a *sufficient* condition for federal-question jurisdiction," at least where federal substantive law provides the applicable rules of decision governing the right of action. *Grable & Sons*, 545 U.S. at 317 (emphasis added).

For decades the Court has consistently sustained the invocation of federal-question jurisdiction under § 1331 when a plaintiff's complaint asserts even a merely colorable right of action under federal law. *E.g.*, *Verizon Md.*, 535 U.S. at 642-43 (right of action asserted under Telecommunications Act of 1996); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998) (right of action asserted under Emergency Planning and Community Right-To-Know Act of 1986); *Oneida Indian Nation v. Oneida County, N.Y.*, 414 U.S. 661, 666-67 (1974) (right of action asserted under Nonintercourse Act); *Illinois v. City of Milwaukee*, 406 U.S. 91, 98-100 (1972) (right of action asserted under federal common law); *Powell v. McCormack*, 395 U.S. at 515-16 (right of action asserted under Article I of the Constitution); *Romero*, 358 U.S. at 359 (right of action asserted under Jones Act); *Lauritzen v. Larsen*, 345 U.S. 571, 575 (1953) (same); *Mont.-Dak. Utils. Co. v. Nw. Pub. Serv. Co.*, 341 U.S. 246,

249 (1951) (right of action asserted under Federal Power Act); *Bell v. Hood*, 327 U.S. 678, 681-82 (1946) (right of action asserted under Fourth and Fifth Amendments); *Peyton v. Ry. Express Agency*, 316 U.S. 350, 352-53 (1942) (right of action asserted under Carmack Amendment);[6] *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913) (right of action asserted under patent laws).

As Justice Frankfurter put it in *Romero*, when a plaintiff "asserts a substantial claim that [a federal statute] affords him a right of recovery," that "assertion alone is sufficient to empower the District Court to assume jurisdiction over the case and determine whether, in fact, the Act does provide the claimed rights." 358 U.S. at 359. Similarly, in *Peyton*, the Court affirmed that a "cause of action [that] has its origin in and is controlled by" an act of Congress "arises under" that act. 316 U.S. at 352. In the words of Justice Holmes, "if the plaintiff really makes a substantial claim under an act of Congress, there is jurisdiction whether the claim ultimately be held good or bad." *Kohler Die*, 228 U.S. at 25.

This Court has, in one instance, held that a right of action created by a federal statute does not necessarily "arise under" federal law for purposes of § 1331. In *Shoshone Mining Co. v. Rutter*, 177 U.S. 505 (1900), the court held that an "adverse suit" to

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[6] *Peyton* involved 28 U.S.C. § 1337's grant of jurisdiction over actions arising under federal laws regulating commerce, but as the Court there made plain by relying on other decisions construing the general federal-question jurisdictional statute, the scope of "arising under" jurisdiction under §§ 1331 and 1337 is the same. *See* 316 U.S. at 353.

determine ownership of a mining claim, which was permitted by federal statutes, did not necessarily fall within the jurisdiction conferred by § 1331. But the statutory right of action at issue in *Shoshone Mining* was an odd one because it provided that state, territorial, and local statutory and customary law would in many instances provide the rule of decision. *See* 177 U.S. at 508. The Court held that in cases where only matters of state or local law were raised by an adverse suit, and no question of the "construction or effect" of federal law was involved, an adverse suit was not one arising under federal law. *Id.* at 509. By contrast, an adverse suit that actually turned on an issue of federal law *would* arise under federal law for jurisdictional purposes. *Id.* at 508.

Importantly, the Court recognized that if the federal statute at issue had not only created a right of action, but also created the substantive rights to be vindicated and the law to be applied in that action, an action brought under the statute would "necessarily involve[]" the kind of "controversy as to the scope and effect of the statute" that would satisfy the jurisdictional requirement of a federal question in *every* case brought under the statute. *Id.* at 510. Equally importantly, the Court recognized that when Congress enacts a law that does not expressly modify existing jurisdictional statutes, Congress leaves those statutes in place, so that an action under the law is within federal jurisdiction if it satisfies the requirements of the pre-existing jurisdictional statutes, whether based on diversity or federal-question jurisdiction. *See id.* at 506-07 ("Leaving the matter as it did, it unquestionably meant that the competency of the court should be determined by rules theretofore prescribed in respect to the jurisdiction of the Federal courts.").

Shoshone thus represents "an extremely rare exception to the sufficiency of a federal right of action" under § 1331, *Grable & Sons*, 545 U.S. at 317 n.4, applicable in the unusual situation where a federal statute purports to confer a right of action not governed by federal law. Outside that situation, the Court has recognized that a right of action conferred by and governed by federal law arises under the laws of the United States for purposes of § 1331. Indeed, the Court has held that even where *state* law creates a right of action, a claim that requires the decision of contested and substantial issues of federal law that are essential to the plaintiff's claim and appear on the face of a well-pleaded complaint (*i.e.*, are not raised in anticipation of a federal-law defense) may arise under federal law for purposes of § 1331. *See Grable & Sons*, 545 U.S. at 312-15; *City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156, 164 (1997); *Gully v. First Nat'l Bank*, 299 U.S. 109, 117-118 (1936); *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180, 199 (1921). As *Grable & Sons* explains, these cases illustrate that a right of action that is both created by and governed by federal law is not *necessary* to federal-question jurisdiction under § 1331, though it is *sufficient* to satisfy § 1331. 545 U.S. at 317.

Because § 1331 broadly confers federal jurisdiction over all civil actions arising under federal law, Congress need not separately express an intention to grant subject-matter jurisdiction when it creates a right of action governed by federal law. Section 1331 stands ready as, in this Court's words, a "catchall" statute under which "jurisdiction is sufficiently established by allegation of a claim under the Constitution or federal statutes." *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 279 (1977). When Con-

gress acts without specifically addressing the matter of federal jurisdiction, it leaves the issue of jurisdiction to be "determined by rules theretofore prescribed in respect to the jurisdiction of the Federal courts," including the accepted judicial construction of § 1331. *Shoshone Mining*, 177 U.S. at 507. In such cases, the question of congressional intent that determines jurisdiction is whether Congress intended to create a federal-law right of action; if there is a colorable claim that it did, jurisdiction is presumptively available under § 1331. *See Jackson Transit Auth. v. Local Div. 1285, Amalgamated Transit Union*, 457 U.S. 15, 21-23 & n.6 (1982). "The significance of statutory general federal question jurisdiction is that when Congress enacts a substantive law, federal district courts immediately and necessarily attain jurisdiction to hear claims under that statute, without Congress having to do anything more." Wasserman, *Jurisdiction and Merits*, 80 Wash. L. Rev. 643, 677-78 (2005).

Analogously, this Court has held that to establish the applicability of the Tucker Act's general waiver of sovereign immunity, which is necessary to establish jurisdiction over actions seeking a money judgment from the United States, congressional intent to create a substantive right to such relief that falls within the scope of the Tucker Act waiver is sufficient; a second expression of intent to waive sovereign immunity is not necessary. *United States v. White Mt. Apache Tribe*, 537 U.S. 465, 472-73 (2003) (citing *United States v. Mitchell*, 463 U.S. 206, 218-19 (1983)). The common principle is that where Congress provides in general terms for federal jurisdiction over a particular class of cases, and then by statute creates a right of action falling within that class, a sufficient expression

of intent to confer jurisdiction is, by definition, present.

C. A Claim Under the TCPA Arises Under Federal Law Within the Meaning of Section 1331.

The damages claim authorized by the TCPA falls within the heartland of federal-question jurisdiction under § 1331: Not only is the right of action created by a federal statute, but the substantive law governing the right of action is also prescribed by federal law. That is, the TCPA not only provides that a plaintiff may bring an action for damages and injunctive relief, but also supplies the substantive standards whose violation gives rise to the private right of action and specifies the measure of relief for the violation. *See* 47 U.S.C. § 227(b)(3).

The language of the statute leaves no room for doubt that federal law is, in Justice Holmes's words, "the law that creates the cause of action." *American Well Works*, 241 U.S. at 260. The express terms of the TCPA authorize the bringing of an action by a victim of a particularly described form of wrongful conduct for a specified type of recovery from a person responsible for the wrong. As this Court has stated, "to say that A shall be liable to B is the *express* creation of a right of action." *Key Tronic Corp. v. United States*, 511 U.S. 809, 818 n.11 (1994) (quoting *id.* at 822 (Scalia, J., dissenting in part)).

In addition to creating the right of action, the TCPA also provides the substantive law that governs all aspects of a TCPA case. It sets forth, in great detail, standards of conduct for users of automatic telephone dialers, recorded telephone messages, and telephone facsimile machines, *see* 47 U.S.C. § 227(b)(1),

and it authorizes the FCC to provide additional restrictions on the use of such equipment by regulation, *see id.* § 227(b)(2). Only the violation of those federal statutory and regulatory standards gives rise to the liability enforced by the private right of action the TCPA creates: The Act specifies that the action it authorizes must be "based on a violation of this subsection or the regulations prescribed under this subsection." *Id.* § 227(b)(3)(A). The TCPA also prescribes with particularity the remedies available for such violations: injunctive relief, *id.*; actual damages or $500 in statutory damages for each violation, whichever is greater, *id.* § 227(b)(3)(B); and, for a willful or knowing violation, up to three times the actual or statutory damages otherwise available, *id.* § 227(b)(3). In short, federal substantive law governs all aspects of a TCPA claim.

Because federal law both creates the right of action and determines its resolution, a claim under the TCPA "arises under" federal law within the meaning of § 1331. *See Grable & Sons*, 545 U.S. at 317. Because the long-accepted understanding of federal-question jurisdiction under § 1331 readily encompasses TCPA claims, § 1331 "would, standing alone, vest the district courts with jurisdiction over this action." *K Mart Corp. v. Cartier, Inc.*, 485 U.S. 176, 182 (1988).

II. The TCPA Does Not Displace Federal Jurisdiction Under Section 1331.

A. Jurisdiction Under Section 1331 Is Available Unless Congress Has Acted Affirmatively to Remove It.

Congress can and does make exceptions to statutes conferring jurisdiction on the federal district courts,

including § 1331's grant of federal-question jurisdiction. Thus, the district courts are "divested of jurisdiction" otherwise available under § 1331 "if [an] action [falls] within [a] specific grant[] of exclusive jurisdiction" to another court. *K Mart*, 485 U.S. at 182-83. For example, the Hobbs Act, 28 U.S.C. §§ 2342 & 2349, and similar provisions for review of certain agency actions by the federal courts of appeals expressly preclude district court jurisdiction under § 1331 by providing that the jurisdiction of the courts of appeals is exclusive. *See, e.g.*, *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729 (1985); *Harrison v. PPG Indus., Inc.*, 446 U.S. 578 (1980); *Foti v. INS*, 375 U.S. 217 (1963).

Likewise, § 1331 will not provide jurisdiction over a claim that otherwise arises under federal law within the meaning of the statute if Congress has provided that § 1331 is unavailable for that particular type of claim. For example, in *Weinberger v. Salfi*, 422 U.S. 749 (1975), the Court held that jurisdiction under § 1331 is unavailable where the Social Security Act, "[o]n its face, ... bars district court federal-question jurisdiction over suits ... which seek to recover Social Security benefits." *Id.* at 756-57.

The decisive question in such cases is whether the terms of a statute "*divest* the district courts of their authority under 28 U.S.C. § 1331." *Verizon Md.*, 535 U.S. at 642. Because § 1331 otherwise provides a "familiar" grant of federal jurisdiction over *all* civil actions arising under federal law, jurisdiction over such an action cannot be ousted merely because another statute does not affirmatively confer it, but only if a statute "removes the jurisdiction given to the federal

courts." *Whitman v. Dep't of Transp.*, 547 U.S. 512, 513-14 (2006).

The determination of whether Congress has, by statute, precluded the federal courts from exercising jurisdiction under § 1331 over an action arising under federal law must be guided by the principle that the federal courts have an obligation to exercise jurisdiction conferred by Congress and properly invoked by a party. This Court long ago stated in *Cohens v. Virginia*, a federal court "must take jurisdiction if it should." 19 U.S. 264, 404 (1821). A consequence of this principle is that "[w]hen there are statutes clearly defining the jurisdiction of the courts, the force and effect of such provisions should not be disturbed by a mere implication flowing from subsequent legislation." *Rosecrans v. United States*, 165 U.S. 257, 262 (1897). Although jurisdiction may not be created by implication, a court may not read a statute to "destroy a jurisdiction otherwise clearly existing, by mere inferences and doubtful construction." *Id.* at 263. Stated more succinctly, "jurisdiction is not defeated by implication." *Galveston, Harrisburg & San Antonio Ry. Co. v. Wallace*, 223 U.S. 481, 490 (1912).

Similarly, the "cardinal rule ... that repeals by implication are not favored ... counsels a refusal to pare down jurisdiction" granted by statute on the basis of appeals to ambiguous legislative history and negative inferences from subsequent enactments. *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 549 (1972). Thus, absent statutory language requiring limitation of their scope, broad jurisdictional provisions such as § 1331 "must be given the meaning and sweep that their origins and their language dictate." *Id.*

B. Congress Has Not Acted to Divest the District Courts of Their Jurisdiction Under Section 1331 Over TCPA Claims.

1. The TCPA's Permissive Authorization of State-Court Actions Does Not Divest Federal Courts of Jurisdiction.

The TCPA's language does not come close to containing the affirmative divestiture of jurisdiction that would be necessary to prevent federal courts from exercising their authority under § 1331 over claims arising under federal law. The argument that federal courts lack federal-question jurisdiction over TCPA claims rests on statutory language providing, in permissive terms, that an action under the TCPA "may, if otherwise permitted by the laws or rules of court of a State," be brought "in an appropriate court of that State." 47 U.S.C. § 227(b)(3). The statute's language, on its face, does not make resort to state courts mandatory for one wishing to pursue a claim (through the use of a term such as "shall"). It does not state that state-court jurisdiction is exclusive. Nor does the TCPA say that any otherwise available source of federal jurisdiction may not be invoked for claims under it. Indeed, the provision creating the private right of action does not purport to address federal-court jurisdiction at all.

Such statutory language is insufficient to preclude a court from exercising jurisdiction it otherwise possesses, for "the grant of jurisdiction to one court does not, of itself, imply that the jurisdiction is to be exclusive." *Bank of N.Y.*, 296 U.S. at 479. This Court reaffirmed this principle and applied it to directly analogous statutory language in *Tafflin v. Levitt*, 493 U.S.

455. *Tafflin* concerned the Racketeering Influenced and Corrupt Organizations Act (RICO), which, like the TCPA, provides a private right of action and, in the same sentence, says that a person "may" bring the action in a particular court (without mentioning any other courts). Specifically, RICO's private right of action provision states: "Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee." 18 U.S.C. § 1964(c). The issue in *Tafflin* was whether the statute's reference to the federal courts precludes state courts from exercising the jurisdiction they would otherwise possess over a RICO claim under the long-established principle that state courts of general jurisdiction have concurrent jurisdiction with federal courts over claims arising under federal law. *See Claflin v. Houseman,* 93 U.S. 130, 136-37 (1876); *Charles Dowd Box Co. v. Courtney,* 368 U.S. 502, 507-08 (1962); *Gulf Offshore Co. v. Mobil Oil Corp.,* 453 U.S. 473, 477-78 (1981).

Holding that RICO does not divest state courts of jurisdiction, *Tafflin* observed that RICO's "grant of federal jurisdiction is plainly permissive, not mandatory, for '[t]he statute does not state nor even suggest that such jurisdiction shall be exclusive. It provides that suits of the kind described 'may' be brought in the federal district courts, not that they must be.'" 493 U.S. at 460-61 (quoting *Dowd Box*, 368 U.S. at 506). The Court emphasized that "[i]t is black letter law ... that the mere grant of jurisdiction to a federal court does not operate to oust a state court from concurrent jurisdiction over the cause of action." *Id.* at

461 (quoting *Gulf Offshore*, 453 U.S. at 479). The Court found "nothing in the language of RICO—much less an 'explicit statutory directive'—to suggest that Congress has, by affirmative enactment, divested the state courts of jurisdiction to hear civil RICO claims." *Id.* at 460.

Likewise, in *Yellow Freight System, Inc. v. Donnelly*, 494 U.S. 820 (1990), the Court held that Title VII, by permitting actions to be brought in federal courts (and saying nothing about state-court jurisdiction), does not preclude state courts from exercising concurrent jurisdiction over Title VII claims. As in *Tafflin*, the Court stressed that the statute "contains no language that expressly confines jurisdiction to federal courts or ousts state courts of their presumptive jurisdiction." *Id.* at 823. That "omission" was "strong, and arguably sufficient, evidence that Congress had no such intent." *Id.*

The TCPA has exactly the same features that the Court found dispositive in *Tafflin* and *Donnelly*. Its authorization of state-court litigation is permissive, not mandatory; it nowhere states that an action *must* be brought in state court; and it contains no language making state-court jurisdiction exclusive or otherwise ousting federal courts of their presumptive concurrent jurisdiction over federal claims under § 1331. In short, if the statutory language in *Tafflin* or *Donnelly* did not divest state courts of jurisdiction over RICO and Title VII claims, the statutory language here does not divest federal courts of jurisdiction over TCPA claims.

That the issue in *Tafflin* and *Donnelly* was whether *state* courts were ousted of jurisdiction, while the issue here is whether *federal* courts have been divest-

ed of jurisdiction, does not change the analysis. *Tafflin* and *Donnelly*, after all, rested on the presumption of *concurrent* state and federal-court jurisdiction over federal-question cases. That presumption, by definition, goes both ways—that is, it is a presumption that *both* court systems possess jurisdiction unless Congress says otherwise. In the case of the state courts, the presumption that they have such jurisdiction rests both on the notion that a court of general jurisdiction has the power to hear and determine "any civil and transitory cause of action created by" the law of another jurisdiction, *Galveston, Harrisburg & San Antonio Ry. Co.*, 223 U.S. at 491, and on the idea that, under the Supremacy Clause, "[t]he laws of the United States are laws in the several States, and just as much binding on the citizens and courts thereof as the State laws are." *Tafflin*, 493 U.S. at 469 (Scalia, J., concurring) (quoting *Claflin*, 93 U.S. at 136-37). In the case of the federal courts, presumptive jurisdiction over federal claims rests on Congress's express conferral of broad jurisdiction over all cases arising under federal law. In either case, jurisdiction exists unless Congress takes it away.

Thus, this Court has applied the same analysis to assess both arguments that federal statutes foreclose state-court jurisdiction and arguments that statutes preclude exercise of federal-question jurisdiction under § 1331. In the first type of case, as the Court said in *Tafflin* and *Donnelly*, the issue is whether Congress has "ousted" state courts of jurisdiction they otherwise possess. Similarly, the Court in *Verizon Maryland* and *Whitman* stated that when a claim otherwise falls within § 1331's broad grant of federal-question jurisdiction, the jurisdictional issue turns on whether some other statute "divests" them of or "re-

moves" such jurisdiction. *Verizon Md.*, 535 U.S. at 642; *Whitman*, 547 U.S. at 513-14. Given the analytical equivalence of the two inquiries, statutory language insufficient to accomplish the former also fails to do the latter.

Other decisions of this Court confirm that divestiture of § 1331 jurisdiction may not be inferred from provisions permitting, but not requiring, particular types of actions to be brought in other courts. For example, in *Bowen v. Massachusetts*, the Court held that § 1331 provides subject-matter jurisdiction for an action against the United States seeking monetary relief exceeding $10,000 (if there is an applicable waiver of sovereign immunity). 487 U.S. 879, 891 & nn. 15-16, 910 (1988). The Court so held even though the Tucker Act, 28 U.S.C. § 1491, grants jurisdiction to the Court of Federal Claims over actions seeking such monetary relief (while the Little Tucker Act, 28 U.S.C. § 1346(a)(2), provides the district courts with concurrent jurisdiction only if monetary claims do not exceed $10,000). As *Bowen* noted, the Tucker Act does not grant *exclusive* jurisdiction to the Court of Federal Claims, and thus the statutory scheme does not oust the district courts of their federal-question jurisdiction over claims for monetary relief exceeding $10,000. District courts therefore may exercise federal-question jurisdiction over such claims if and when there is an applicable waiver of sovereign immunity and a statutory right of action. 487 U.S. at 910 n.48.[7]

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[7] In *Bowen*, both the right of action and the applicable waiver of sovereign immunity were found in the Administrative Procedure Act (APA), 5 U.S.C. § 702. As the Court pointed out, in most instances, the Court of Federal Claims will be the exclusive

(*Footnote continued*)

Likewise, in *Verizon Maryland*, the Court rejected the proposition that a provision of the Telecommunications Act of 1996, 47 U.S.C. § 252(e)(6), which allows district courts to review certain orders issued by state public service commissions, impliedly forecloses the exercise of the courts' otherwise available federal-question jurisdiction under § 1331 to review other types of orders. 535 U.S. at 643. The Court emphasized that in light of § 1331's facial applicability, the issue was whether § 252(e)(6)'s terms were "enough to eliminate jurisdiction under § 1331." *Id.* Because the statute at issue "d[id] not even mention subject-matter jurisdiction," and merely, in permissive terms, authorized a right of action under other circumstances, the Court concluded that it left "the jurisdictional grant of § 1331 untouched." *Id.* at 644.

This Court has also held that statutes giving it non-exclusive original jurisdiction over cases to which states are parties do not impliedly preclude the district courts from exercising federal-question jurisdiction over such actions if they arise under federal law within the meaning of § 1331. *See Illinois v. City of Milwaukee*, 406 U.S. at 100-01; *Ames v. Kansas*, 111 U.S. 449 (1884). As the Court explained in *Ames*, the

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court available for monetary relief claims against the United States for more than $10,000, because the APA waiver does not extend to claims for "money damages," which the monetary claims in *Bowen* were held not to be. *See* 487 U.S. at 910 & n.48; *see also Van Drasek v. Lehman*, 762 F.2d 1065, 1071 n.10 (D.C. Cir. 1985) ("[T]he jurisdiction of the Court of [Federal] Claims for suits claiming more than $10,000 is not exclusive; rather, there is rarely any statute available that waives sovereign immunity for suits in the district court, other than the Tucker Act with its $10,000 limit.").

availability of jurisdiction in this Court over such actions does not "exempt[]" suits involving states from the "operation" of § 1331 where the terms of the statute otherwise provide "the requisite jurisdiction." 111 U.S. at 470.

Similarly, in *Breuer v. Jim's Concrete of Brevard, Inc.*, 538 U.S. 691 (2003), this Court held that a provision in the Fair Labor Standards Act (FLSA) stating that an action "may be maintained ... in any State or Federal court of competent jurisdiction," 29 U.S.C. § 216(b), did not preclude the exercise of removal jurisdiction under 28 U.S.C. § 1441 (based on the existence of original federal-question jurisdiction under § 1331) over the objection of a plaintiff who wished to "maintain" the action in state court. The Court observed that "[n]othing on the face of 29 U.S.C. § 216(b) looks like an express prohibition of removal, there being no mention of removal, let alone of prohibition." 538 U.S. at 694. The Court accordingly held that the statutory permission to litigate claims in state court does not impliedly displace the federal courts' removal jurisdiction under § 1441 over cases otherwise falling within § 1331's jurisdictional grant.

The common thread in all these decisions is that otherwise existing jurisdiction, such as the federal courts' jurisdiction over federal-question cases under § 1331, is not taken away by a statutory provision that permits some other exercise of judicial authority without mentioning, let alone limiting, the jurisdiction already available. That principle is fully applicable to the TCPA, which says not a word to indicate that state-court jurisdiction is exclusive or otherwise to disturb the jurisdiction already conferred by statute on the federal courts.

The absence of any textual suggestion that state-court jurisdiction is exclusive is particularly striking because another TCPA provision, § 227(f)(2), expressly provides that federal-court jurisdiction over actions brought by state attorneys general to enforce the act is "exclusive." Thus, "§ 227(f)(2) is explicit about exclusivity, while § 227(b)(3) is not; the natural inference is that the state forum mentioned in § 227(b)(3) is optional rather than mandatory." *Brill*, 427 F.3d at 451. The fact that "where otherwise applicable jurisdiction was meant to be excluded, it was excluded expressly" strongly "reinforce[s] the conclusion that [the statute's] silence on the subject leaves the jurisdictional grant of § 1331 untouched." *Verizon Md.*, 535 U.S. at 644.

This conclusion is underscored by the so-far unanimous agreement of the courts of appeals that the district courts may exercise *diversity* jurisdiction over TCPA claims under 28 U.S.C. § 1332. *See, e.g.*, *Gottlieb*, 436 F.3d at 338-41. As the Second Circuit observed in *Gottlieb*, "[n]othing in § 227(b)(3), or in any other provision of the statute, expressly divests federal courts of diversity jurisdiction over private actions under the TCPA." *Id.* at 340. Thus, *Gottlieb* held, § 1332 jurisdiction is available because "diversity jurisdiction is presumed to exist for all causes of action so long as the statutory requirements are satisfied" unless it has been "expressly abrogated by Congress." *Id.*

Exactly the same is true with respect to federal-question jurisdiction: Nothing in the TCPA expressly divests federal courts of federal-question jurisdiction, and, as *Verizon Maryland* and the many other decisions discussed above establish, jurisdiction under

§ 1331 is presumptively available for cases that meet its statutory requirements unless Congress has acted to remove that jurisdiction. There is no basis for holding that diversity jurisdiction should be given preferential treatment over federal-question jurisdiction in determining whether another statute has abrogated otherwise available jurisdiction. Indeed, the history of the last century and a half of jurisdictional legislation is that Congress has, if anything, expressed a preference for federal-question jurisdiction by consistently liberalizing its availability while limiting diversity jurisdiction. *See supra* 12-16. There is, therefore, no more reason to find a divestiture of federal-question jurisdiction in the language of TCPA than there is to find that the statute displaces diversity jurisdiction.

To be sure, Congress can and occasionally has prohibited the exercise of federal-question jurisdiction while allowing diversity jurisdiction, but accomplishing that result requires language of a kind absent from the TCPA. For example, the Federal Arbitration Act (FAA), 9 U.S.C. § 4, provides federal jurisdiction to entertain a suit seeking to compel arbitration only if the federal court "would have jurisdiction, 'save for [the arbitration] agreement,' over 'a suit arising out of the controversy between the parties.'" *Vaden v. Discover Bank*, 129 S. Ct. 1262, 1267-68 (2009). Although the FAA makes federal law determinative of the substantive entitlement to arbitrate, the words of § 4 preclude the assertion of federal-question jurisdiction on the basis of that issue of federal law, because the federal question would not exist "save for" the agreement to arbitrate. *Id.* at 1271-72, 1273-75: "The phrase 'save for [the arbitration] agreement' indicates that the district court should assume the absence of the arbitration agreement and determine whether it

'would have jurisdiction under title 28' without it." *Id.* at 1273. The statutory language would be superfluous if § 1331 jurisdiction could be based on the federal-law claim that an arbitration agreement should be enforced. *Id.* at 1273-74. The TCPA contains no language specifically aimed at achieving a similar "'anomaly' in the realm of federal legislation," *id.* at 1271, by precluding federal-question jurisdiction while allowing diversity jurisdiction.

2. Giving Effect to Section 1331's Grant of Jurisdiction Over Claims Arising Under the TCPA Does Not Make Section 227(b)(3)'s Language Superfluous.

The argument that the TCPA strips the federal courts of jurisdiction under § 1331 rests largely on the notion that § 227(b)(3)'s language providing that an action may be brought in a state court would otherwise be superfluous, because even without that language a state court would presumptively have concurrent jurisdiction over a claim under the TCPA, *see Gulf Offshore Co.*, 453 U.S. at 478, and would be obligated to entertain such claims under the principles of *Testa v. Katt*, 330 U.S. 386, which forbid state courts to discriminate against federal causes of action. Unless § 227(b)(3)'s words exclude federal jurisdiction, the argument goes, they do nothing at all.

Of course, the same could have been said in *Tafflin*: Even if the provision creating the RICO right of action did not say that a RICO plaintiff "may sue ... in any appropriate federal district court," the federal district courts would have had jurisdiction over such actions under § 1331 (and § 1337), and thus a plaintiff could bring such a suit in whatever district court was

"appropriate" under the venue statutes. The arguable superfluity of the words, however, did not lead the Court to give them a meaning they could not bear—namely, that concurrent state-court jurisdiction was precluded. As this Court has recently observed, "the rule against giving a portion of text an interpretation which renders it superfluous does not prescribe that a passage which could have been more terse does not mean what it says." *Bruesewitz v. Wyeth LLC*, 131 S. Ct. 1068, 1078 (2011). By the same token, the rule cannot require interpreting statutory text to mean what it does *not* say.

In any event, the statutory permission to bring an action in state court is hardly superfluous if it is not read to foreclose federal jurisdiction. First, as Judge Posner has pointed out, the language puts to rest any suggestion that *federal* jurisdiction might be exclusive—a matter of some significance given that litigation over whether RICO and Title VII conferred exclusive federal jurisdiction (despite the absence of language in the statutes saying so) generated "decades of litigation" even in the face of precedents such as *Gulf Offshore*, *Dowd Box*, and *Claflin* that indicated a strong presumption in favor of concurrent jurisdiction. *Brill*, 427 F.3d at 451.

Moreover, § 227(b)(3) does not merely provide that a plaintiff may bring a TCPA action in state court; it provides that she may do so "if otherwise permitted by the laws or rules of court of a State." Thus, the statute spells out the conditions under which a state court must entertain a TCPA action. Whatever the precise scope of that language may be (a question that is not presented here), it is far from clear that it prescribes exactly the same standard that would prevail

under the nondiscrimination principle of *Testa v. Katt* in the absence of the language allowing an action in state court "if otherwise permitted."

For example, it seems debatable whether the outcome in *Haywood v. Drown*, 129 S. Ct. 2108 (2009), would have been the same if 42 U.S.C. § 1983 provided that an action under it could be brought in state court only if otherwise permitted by state law or rules of court. *Haywood* held that, under *Testa*'s nondiscrimination principle, a § 1983 damages action against a state prison employee may be brought in a state court despite a state-law jurisdictional provision foreclosing such actions (whether based on state or federal law) and providing an alternative remedy in the form of a damages claim against the state in another court. Certainly the analysis of the issue, even if not the ultimate result, would have been different had it turned on the meaning of a statute with language similar to that of § 227(b)(3) rather than on the scope of the judicially created rule of *Testa*.

In short, the language of § 227(b)(3) "may serve the further function of freeing states from *Testa's* rule that they may not discriminate against federal claims." *Brill*, 427 F.3d at 451. At a minimum, it substitutes a statutory standard that is phrased quite differently from *Testa*'s nondiscrimination principle.[8]

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[8] Possible interpretations of the "otherwise permitted" language are canvassed in *MLC Mortgage Corp. v. Sun America Mortgage Co.*, 212 P.3d 1199 (Okla. 2009). These include: (1) the view that the statute requires affirmative state statutory authorization for TCPA actions; (2) the view that the statute permits states to forbid TCPA actions; and (3) the view that the statutory standard is similar to *Testa*'s nondiscrimination principle, and permits only neutral state jurisdictional statutes.

3. Legislative History Does Not Support Reading the TCPA to Displace Federal-Question Jurisdiction Under Section 1331.

Lower courts that have held that the TCPA precludes exercise of federal-question jurisdiction over claims arising under the Act have placed considerable reliance on the TCPA's legislative history. *See, e.g.*, *ErieNet*, 156 F.3d at 515; *Int'l Sci.*, 106 F.3d at 1152-53. But the fragment of legislative history that addresses the significance of the Act's reference to state courts provides no support for reading into the Act a limitation on § 1331 that is not present on the face of the TCPA.

To begin with, reliance on legislative history to find the clear indication of congressional intent necessary to withdraw jurisdiction already provided by another statute is highly suspect when the statutory language itself does not even address federal jurisdiction. As Justice Scalia stated in his concurrence in *Taflin*, "it is simply wrong in principle to assert that Congress can effect this affirmative legislative act by simply talking about it ...." 493 U.S. at 472. Thus, in *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546 (2005), the Court refused to rely even on apparently clear statements in legislative history materials to override a facially applicable congressional grant of jurisdiction to the federal courts:

> [T]he authoritative statement is the statutory text, not the legislative history or any other extrinsic material. Extrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous

> terms. Not all extrinsic materials are reliable sources of insight into legislative understandings, however ....

Id. at 568.

The Court in *Exxon* identified "two serious criticisms" frequently applicable to legislative history: Its often ambiguous and unilluminating nature, and its tendency to represent the views only of particular members of Congress (or even their staffs) because it is not, unlike a statute passed by both the House and Senate, subjected to the "requirements of Article I." *Id.* As in *Exxon*, "in this instance both criticisms are right on the mark." *Id.* at 569. The legislative history reflects only the views of a single member, and contains no clear suggestion—indeed, no suggestion of any kind—that the TCPA was intended to make state-court jurisdiction exclusive.

Specifically, the legislative history cited by the lower courts consists of a floor statement by one of the congressional sponsors of the TCPA, Senator Hollings:

> The substitute bill contains a private right-of-action provision that will make it easier for consumers to recover damages from receiving these computerized calls. The provision would allow consumers to bring an action in State court against any entity that violates the bill. The bill does not, because of constitutional constraints, dictate to the States which court in each State shall be the proper venue for such an action, as this is a matter for State legislators to determine. Nevertheless, it is my hope that States will make it as easy as possible for consumers to bring such actions, preferably in small claims court ....

137 Cong. Rec. S16205 (daily ed. Nov. 7, 1991).

"[O]rdinarily even the contemporaneous remarks of a single legislator who sponsors a bill are not controlling in analyzing legislative history." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 (1980). And here, the floor statement does not even address the relevant question: Whether the statute forecloses reliance on otherwise-available bases of federal jurisdiction. Senator Hollings's statement for the most part only repeats what the statutory language provides—namely, that the private right of action created by the TCPA would "allow" actions in state court if otherwise permitted by state law. If, as *Tafflin* holds, such permissive language in a statute does not oust a court of jurisdiction it otherwise possesses, surely the mere repetition of the same permissive language by a congressional sponsor cannot transform the statute's words into an ouster of jurisdiction.

Similarly, Senator Hollings's expression of hope that the states will allow actions to be brought in their courts, and particularly that small-claims courts will be available for small-damages actions, in no way suggests that federal-court actions are precluded. It merely represents his view that many TCPA actions will be suited for resolution by small-claims courts. In *Donnelly*, this Court held that the expectation of members of Congress that Title VII actions would be brought in federal court, "even if universally shared," was "not an adequate substitute for a legislative decision to overcome the presumption of concurrent jurisdiction." 494 U.S. at 824-25. The same is necessarily true of the hopes of a single Senator.

In sum, as in *Donnelly* and *Tafflin*, the cited legislative history contains *no* discussion one way or the other of conferring exclusive jurisdiction over the private right of action on any court, "much less any suggestion that Congress affirmatively intended to confer exclusive jurisdiction over such claims on the [state] courts." *Tafflin*, 493 U.S. at 461. "Like its plain text, the legislative history of the Act affirmatively describes the jurisdiction of the [state] courts, but is completely silent on any role of the [federal] courts ...." *Donnelly*, 494 U.S. at 825. As in *Tafflin* and *Donnelly*, such legislative history cannot supply what the TCPA's text does not: an affirmative ouster of the jurisdiction § 1331 provides over claims arising under federal law.

4. Reading an Ouster of Federal-Question Jurisdiction Into the TCPA Would Impede Important Federal Policies.

a. The TCPA Serves Significant Federal Interests.

Some of the lower courts that have held that § 227(b)(3) precludes the exercise of federal-question jurisdiction have asserted that the TCPA does not embody significant federal interests, because its passage was primarily motivated by the perceived need to supplement state laws that could not effectively achieve their objectives because many telemarketers operate across state lines. *See, e.g.*, *ErieNet*, 156 F.3d at 518 (citing TCPA § 2(7), 105 Stat. 2394). The absence of a real federal interest underlying the law, these courts have suggested, diminishes the need for the exercise of federal-question jurisdiction.

This view is mistaken on several levels. To begin with, federal-question jurisdiction under § 1331 does not depend on the nature of the interests served by the federal law on which a particular action is based: It depends on whether the action arises under federal law. The notion that the courts are authorized to excise some matters arising under federal law from their jurisdiction because they view the interests served by a congressional enactment to be insufficiently "federal" finds no support in this Court's jurisprudence.

In addition, the idea that enactments motivated in whole or in part by the perceived inefficacy of state efforts to control interstate transactions do not serve federal interests is fundamentally wrong. Many critically important congressional enactments rest on precisely that basis. The Federal Power Act, for example, was enacted in large part because, following this Court's decision in *Public Utilities Commission v. Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927), states lacked the ability to control wholesale rates for electricity sold in interstate commerce. *See New York v. FERC*, 535 U.S. 1, 5-6 (2002). Yet no one would seriously suggest that the Federal Power Act does not serve a real federal interest. Indeed, under the Commerce Clause, controlling interstate commercial activities that escape state regulation could be considered the quintessential federal interest.

Moreover, if Congress saw no federal interest in protecting consumers against unwanted telemarketing calls, junk faxes, and the like, the inadequacy of state efforts to regulate such practices would have been of no concern. The findings supporting the TCPA demonstrate that Congress was not pursuing

policies to which it was indifferent merely because the states could not do so by themselves. Rather, Congress found that both individuals and businesses have legitimate interests in avoiding being targeted by intrusive and costly telemarketing practices, and that such practices interfere with interstate commerce, a particularly weighty federal concern. *See* TCPA §§ 2(5)-(6), (10)-(15), 105 Stat. 2394 (discussed *supra* at 4-5).

Congress also found that the legitimate interests it saw in regulating telemarketing abuses had to be balanced against other important federal interests—namely, interests in "commercial freedoms of speech and trade." *Id.* § 2(9). Precisely because of the importance of the interests on both sides, Congress struck much of the balance itself: It did not simply rely on existing state-law restrictions, but supplied its own set of prohibitions and remedies, supplemented by delegations of regulatory authority to a *federal* agency, the FCC. *See* 47 U.S.C. §§ 227(b), (c), (d) & (f). At the same time, Congress permitted a *separate* sphere for state regulation by providing that state-law restrictions would generally not be preempted by the TCPA. *See* 47 U.S.C. § 227(e). In short, the congressional findings supporting the TCPA, together with the reticulated scheme of regulation created by the statute, refute any suggestion that the TCPA does not serve genuine or important federal interests.

b. Precluding Federal-Question Jurisdiction Would Impair the Federal Interests Served by the TCPA.

This Court has occasionally held that the federal interest in uniform interpretation of a federal statute is significant enough to preclude, by implication, con-

current state-court jurisdiction over matters arising under the statute. *See Tafflin*, 493 U.S. at 471 (Scalia, J., concurring) (discussing the Court's precedents holding Sherman and Clayton Act cases to be within exclusive federal jurisdiction). But the notion that there could be a comparable interest in *disabling* federal courts from uniformly interpreting federal law seems doubtful at best. Any such view would be particularly farfetched with respect to the TCPA, given that the Act expressly provides that actions by state attorneys general challenging widespread patterns and practices of abuse *must* be brought in federal court. 47 U.S.C. § 227(f)(2).

Far from serving the policies of the TCPA, precluding federal-question jurisdiction would substantially undermine them. The structure of the Act makes clear the important role that the private right of action serves in enforcing the Act, because the only governmental actions expressly authorized by the statute are those where a pattern or practice of misconduct can be identified. *See id.* § 227(f)(1). In addition, the Act's provisions for statutory damages and substantial enhancement of those damages in cases involving knowing or willful violations make clear that Congress intended the private right of action to be a remedy with teeth. *See id.* § 227(b)(3).

But because the statute makes a plaintiff's ability to proceed in state court contingent on whether a state's laws and rules of court "otherwise permit[]" such an action, reading the TCPA to foreclose federal-question jurisdiction could threaten to pull those teeth. Although the scope of the "otherwise permitted" language is uncertain, it at least suggests the possibility that states could channel TCPA actions in-

to inconvenient fora or even refuse altogether to entertain them. Indeed, the Supreme Court of Texas has held that TCPA actions may not be entertained by Texas courts in the absence of specific state statutory authorization, *see The Chair King, Inc. v. GTE Mobilnet of Houston, Inc.*, 184 S.W.3d 707 (Tex. 2006), and other state courts, while not adopting this "opt-in" requirement, have indicated that states are free to "opt out" of allowing TCPA actions in their courts. *See, e.g., Reynolds v. Diamond Foods & Poultry, Inc.*, 79 S.W.3d 907 (Mo. 2002).[9] Thus, reading § 227(b)(3) to oust the federal courts of jurisdiction under § 1331 threatens to leave some victims of telemarketing abuses without the remedy that Congress intended to provide.

That result is hardly what one would expect from a Congress so concerned with the inadequacy of the state-by-state approach to regulating telemarketing, and with the privacy and other interests that unregulated autodialing, robocalling, and junk faxing threaten, that it created a uniform set of federal prohibitions, authorized the FCC to provide a uniform set of regulatory refinements to those prohibitions, and created a remedial scheme including a private right of action. As Judge Posner put it, "the proviso that actions may be filed in state court 'if otherwise permitted by the laws or rules of court of a State' implies that federal jurisdiction under § 1331 or § 1332 is available; otherwise where would victims go if a state

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[9] Other state courts have held that the "otherwise permitted" language does not permit states to discriminate against the TCPA right of action. *See, e.g., Italia Foods, Inc. v. Sun Tours, Inc.*, __ N.E.2d __, 2011 WL 2163718 (Ill. June 3, 2011).

elected not to entertain these suits?" *Brill*, 427 F.3d at 451.

The possible availability of diversity jurisdiction even if federal-question jurisdiction is precluded does little to ameliorate the potential negative impact of making the federal courts unavailable under § 1331. For starters, a holding that § 1331 jurisdiction is precluded would threaten the consensus among the lower courts that § 1332 jurisdiction is available, because "if state jurisdiction really is 'exclusive,' then it knocks out § 1332 as well as § 1331." *Brill*, 527 F.3d at 450. Even if that were not the case, however, the availability of diversity but not federal-question jurisdiction would create its own set of conundrums: Plaintiffs whose states did not "otherwise permit[]" a TCPA action to be brought in their courts would have the ability to recover only if, by happenstance, there were diversity of citizenship and enough violations to create an amount in controversy exceeding $75,000 in an individual action or an aggregate amount in controversy exceeding $5 million in a class action. See 28 U.S.C. §§ 1332(a) & (d)(2). That result would be both arbitrary and contrary to the general rule that neither diversity jurisdiction nor the availability of a class action is supposed to affect whether a plaintiff has a claim as a matter of substantive law. *See Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 130 S. Ct. 1431 (2010). There is no reason to think that Congress—especially a Congress that set out to create a uniform set of federal rules governing telemarketers—intended such a topsy-turvy state of affairs.

This is not to denigrate the important objective served by Congress's authorization for state courts to entertain TCPA actions. As discussed above, the sta-

tute reflects the hope of its congressional sponsors that the states would make their courts, and particularly small-claims courts, available for actions that the parties consider appropriate for litigation in those fora. *See supra* at 40-41. But encouraging the availability of state courts is a far different matter from depriving the parties of the possibility of a federal forum in a matter otherwise within the scope of the federal courts' statutorily conferred jurisdiction, or, worse yet, potentially depriving a plaintiff who has been subjected to a TCPA violation of *any* remedy if a state chooses to withhold one. The Court should not interpret a statute that is *silent* on the matter of federal jurisdiction to bring about such an extraordinary result.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed, and the case remanded for further proceedings on the merits of the TCPA claims.

Respectfully submitted,

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APPENDIX

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47 U.S.C. § 227
(Telephone Consumer Protection Act)

§ 227. Restrictions on use of telephone equipment

(a) Definitions

As used in this section—

(1) The term "automatic telephone dialing system" means equipment which has the capacity—

(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and

(B) to dial such numbers.

(2) The term "established business relationship", for purposes only of subsection(b)(1)(C)(i) of this section, shall have the meaning given the term in section 64.1200 of title 47, Code of Federal Regulations, as in effect on January 1, 2003, except that—

(A) such term shall include a relationship between a person or entity and a business subscriber subject to the same terms applicable under such section to a relationship between a person or entity and a residential subscriber; and

(B) an established business relationship shall be subject to any time limitation established pursuant to paragraph (2)(G)).[1]

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[1] So in original. Second closing parenthesis probably should not appear.

(3) The term "telephone facsimile machine" means equipment which has the capacity (A) to transcribe text or images, or both, from paper into an electronic signal and to transmit that signal over a regular telephone line, or (B) to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper.

(4) The term "telephone solicitation" means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person, but such term does not include a call or message (A) to any person with that person's prior express invitation or permission, (B) to any person with whom the caller has an established business relationship, or (C) by a tax exempt nonprofit organization.

(5) The term "unsolicited advertisement" means any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission, in writing or otherwise.

(b) Restrictions on use of automated telephone equipment

(1) Prohibitions

It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States—

(A) to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any

automatic telephone dialing system or an artificial or prerecorded voice—

(i) to any emergency telephone line (including any "911" line and any emergency line of a hospital, medical physician or service office, health care facility, poison control center, or fire protection or law enforcement agency);

(ii) to the telephone line of any guest room or patient room of a hospital, health care facility, elderly home, or similar establishment; or

(iii) to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call;

(B) to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is initiated for emergency purposes or is exempted by rule or order by the Commission under paragraph (2)(B);

(C) to use any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement, unless—

(i) the unsolicited advertisement is from a sender with an established business relationship with the recipient;

(ii) the sender obtained the number of the telephone facsimile machine through—

(I) the voluntary communication of such number, within the context of such established business relationship, from the recipient of the unsolicited advertisement, or

(II) a directory, advertisement, or site on the Internet to which the recipient voluntarily agreed to make available its facsimile number for public distribution,

except that this clause shall not apply in the case of an unsolicited advertisement that is sent based on an established business relationship with the recipient that was in existence before July 9, 2005, if the sender possessed the facsimile machine number of the recipient before July 9, 2005; and

(iii) the unsolicited advertisement contains a notice meeting the requirements under paragraph (2)(D),

except that the exception under clauses (i) and (ii) shall not apply with respect to an unsolicited advertisement sent to a telephone facsimile machine by a sender to whom a request has been made not to send future unsolicited advertisements to such telephone facsimile machine that complies with the requirements under paragraph (2)(E); or

(D) to use an automatic telephone dialing system in such a way that two or more telephone lines of a multi-line business are engaged simultaneously.

(2) Regulations; exemptions and other provisions

The Commission shall prescribe regulations to implement the requirements of this subsection. In implementing the requirements of this subsection, the Commission—

(A) shall consider prescribing regulations to allow businesses to avoid receiving calls made using an artificial or prerecorded voice to which they have not given their prior express consent;

(B) may, by rule or order, exempt from the requirements of paragraph (1)(B) of this subsection, subject to such conditions as the Commission may prescribe—

(i) calls that are not made for a commercial purpose; and

(ii) such classes or categories of calls made for commercial purposes as the Commission determines—

(I) will not adversely affect the privacy rights that this section is intended to protect; and

(II) do not include the transmission of any unsolicited advertisement;

(C) may, by rule or order, exempt from the requirements of paragraph (1)(A)(iii) of this subsection calls to a telephone number assigned to a cellular telephone service that are not charged to the called party, subject to such conditions as the Commission may prescribe as necessary in the interest of the privacy rights this section is intended to protect;

(D) shall provide that a notice contained in an unsolicited advertisement complies with the requirements under this subparagraph only if—

(i) the notice is clear and conspicuous and on the first page of the unsolicited advertisement;

(ii) the notice states that the recipient may make a request to the sender of the unsolicited advertisement not to send any future unsolicited advertisements to a telephone facsimile machine or machines and that failure to comply, within the shortest reasonable time, as determined by the Commission, with such a request meeting the requirements under subparagraph (E) is unlawful;

(iii) the notice sets forth the requirements for a request under subparagraph (E);

(iv) the notice includes—

(I) a domestic contact telephone and facsimile machine number for the recipient to transmit such a request to the sender; and

(II) a cost-free mechanism for a recipient to transmit a request pursuant to such notice to the sender of the unsolicited advertisement; the Commission shall by rule require the sender to provide such a mechanism and may, in the discretion of the Commission and subject to such con-

ditions as the Commission may prescribe, exempt certain classes of small business senders, but only if the Commission determines that the costs to such class are unduly burdensome given the revenues generated by such small businesses;

(v) the telephone and facsimile machine numbers and the cost-free mechanism set forth pursuant to clause (iv) permit an individual or business to make such a request at any time on any day of the week; and

(vi) the notice complies with the requirements of subsection (d) of this section;

(E) shall provide, by rule, that a request not to send future unsolicited advertisements to a telephone facsimile machine complies with the requirements under this subparagraph only if—

(i) the request identifies the telephone number or numbers of the telephone facsimile machine or machines to which the request relates;

(ii) the request is made to the telephone or facsimile number of the sender of such an unsolicited advertisement provided pursuant to subparagraph (D)(iv) or by any other method of communication as determined by the Commission; and

(iii) the person making the request has not, subsequent to such request, provided express invitation or permission to the sender, in writing or otherwise, to send such advertisements to such person at such telephone facsimile machine;

(F) may, in the discretion of the Commission and subject to such conditions as the Commission may prescribe, allow professional or trade associations that are tax-exempt nonprofit organizations to send unsolicited advertisements to their members in furtherance of the association's tax-exempt purpose that do not contain the notice required by paragraph (1)(C)(iii), except that the Commission may take action under this subparagraph only—

(i) by regulation issued after public notice and opportunity for public comment; and

(ii) if the Commission determines that such notice required by paragraph (1)(C)(iii) is not necessary to protect the ability of the members of such associations to stop such associations from sending any future unsolicited advertisements; and

(G)(i) may, consistent with clause (ii), limit the duration of the existence of an established business relationship, however, before establishing any such limits, the Commission shall—

(I) determine whether the existence of the exception under paragraph (1)(C) relating to an established business relationship has resulted in a significant number of complaints to the Commission regarding the sending of unsolicited advertisements to telephone facsimile machines;

(II) determine whether a significant number of any such complaints involve unsolicited advertisements that were sent on the basis of an established business relationship that was longer in duration than the Commission believes is consistent with the reasonable expectations of consumers;

(III) evaluate the costs to senders of demonstrating the existence of an established business relationship within a specified period of time and the benefits to recipients of establishing a limitation on such established business relationship; and

(IV) determine whether with respect to small businesses, the costs would not be unduly burdensome; and

(ii) may not commence a proceeding to determine whether to limit the duration of the existence of an established business relationship before the expiration of the 3-month period that begins on July 9, 2005.

(3) Private right of action

A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State—

(A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation,

(B) an action to recover for actual monetary loss from such a violation, or to receive $500 in damages for each such violation, whichever is greater, or

(C) both such actions.

If the court finds that the defendant willfully or knowingly violated this subsection or the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph.

(c) Protection of subscriber privacy rights

(1) Rulemaking proceeding required

Within 120 days after December 20, 1991, the Commission shall initiate a rulemaking proceeding concerning the need to protect residential telephone subscribers' privacy rights to avoid receiving telephone solicitations to which they object. The proceeding shall—

(A) compare and evaluate alternative methods and procedures (including the use of electronic databases, telephone network technologies, special directory markings, industry-based or company-specific "do not call" systems, and

any other alternatives, individually or in combination) for their effectiveness in protecting such privacy rights, and in terms of their cost and other advantages and disadvantages;

(B) evaluate the categories of public and private entities that would have the capacity to establish and administer such methods and procedures;

(C) consider whether different methods and procedures may apply for local telephone solicitations, such as local telephone solicitations of small businesses or holders of second class mail permits;

(D) consider whether there is a need for additional Commission authority to further restrict telephone solicitations, including those calls exempted under subsection (a)(3) of this section, and, if such a finding is made and supported by the record, propose specific restrictions to the Congress; and

(E) develop proposed regulations to implement the methods and procedures that the Commission determines are most effective and efficient to accomplish the purposes of this section.

(2) Regulations

Not later than 9 months after December 20, 1991, the Commission shall conclude the rulemaking proceeding initiated under paragraph (1) and shall prescribe regulations to implement methods and procedures for protecting the privacy rights described in such paragraph in an efficient, effective, and economic manner and without the impo-

sition of any additional charge to telephone subscribers.

(3) Use of database permitted

The regulations required by paragraph (2) may require the establishment and operation of a single national database to compile a list of telephone numbers of residential subscribers who object to receiving telephone solicitations, and to make that compiled list and parts thereof available for purchase. If the Commission determines to require such a database, such regulations shall—

(A) specify a method by which the Commission will select an entity to administer such database;

(B) require each common carrier providing telephone exchange service, in accordance with regulations prescribed by the Commission, to inform subscribers for telephone exchange service of the opportunity to provide notification, in accordance with regulations established under this paragraph, that such subscriber objects to receiving telephone solicitations;

(C) specify the methods by which each telephone subscriber shall be informed, by the common carrier that provides local exchange service to that subscriber, of (i) the subscriber's right to give or revoke a notification of an objection under subparagraph (A), and (ii) the methods by which such right may be exercised by the subscriber;

(D) specify the methods by which such objections shall be collected and added to the database;

(E) prohibit any residential subscriber from being charged for giving or revoking such notification or for being included in a database compiled under this section;

(F) prohibit any person from making or transmitting a telephone solicitation to the telephone number of any subscriber included in such database;

(G) specify (i) the methods by which any person desiring to make or transmit telephone solicitations will obtain access to the database, by area code or local exchange prefix, as required to avoid calling the telephone numbers of subscribers included in such database; and (ii) the costs to be recovered from such persons;

(H) specify the methods for recovering, from persons accessing such database, the costs involved in identifying, collecting, updating, disseminating, and selling, and other activities relating to, the operations of the database that are incurred by the entities carrying out those activities;

(I) specify the frequency with which such database will be updated and specify the method by which such updating will take effect for purposes of compliance with the regulations prescribed under this subsection;

(J) be designed to enable States to use the database mechanism selected by the Commission for purposes of administering or enforcing State law;

(K) prohibit the use of such database for any purpose other than compliance with the re-

quirements of this section and any such State law and specify methods for protection of the privacy rights of persons whose numbers are included in such database; and

(L) require each common carrier providing services to any person for the purpose of making telephone solicitations to notify such person of the requirements of this section and the regulations thereunder.

(4) Considerations required for use of database method

If the Commission determines to require the database mechanism described in paragraph (3), the Commission shall—

(A) in developing procedures for gaining access to the database, consider the different needs of telemarketers conducting business on a national, regional, State, or local level;

(B) develop a fee schedule or price structure for recouping the cost of such database that recognizes such differences and—

(i) reflect the relative costs of providing a national, regional, State, or local list of phone numbers of subscribers who object to receiving telephone solicitations;

(ii) reflect the relative costs of providing such lists on paper or electronic media; and

(iii) not place an unreasonable financial burden on small businesses; and

(C) consider (i) whether the needs of telemarketers operating on a local basis could be met through special markings of area white

pages directories, and (ii) if such directories are needed as an adjunct to database lists prepared by area code and local exchange prefix.

(5) Private right of action

A person who has received more than one telephone call within any 12-month period by or on behalf of the same entity in violation of the regulations prescribed under this subsection may, if otherwise permitted by the laws or rules of court of a State bring in an appropriate court of that State—

(A) an action based on a violation of the regulations prescribed under this subsection to enjoin such violation,

(B) an action to recover for actual monetary loss from such a violation, or to receive up to $500 in damages for each such violation, whichever is greater, or

(C) both such actions.

It shall be an affirmative defense in any action brought under this paragraph that the defendant has established and implemented, with due care, reasonable practices and procedures to effectively prevent telephone solicitations in violation of the regulations prescribed under this subsection. If the court finds that the defendant willfully or knowingly violated the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph.

(6) Relation to subsection (b)

The provisions of this subsection shall not be construed to permit a communication prohibited by subsection (b) of this section.

(d) Technical and procedural standards

(1) Prohibition

It shall be unlawful for any person within the United States—

(A) to initiate any communication using a telephone facsimile machine, or to make any telephone call using any automatic telephone dialing system, that does not comply with the technical and procedural standards prescribed under this subsection, or to use any telephone facsimile machine or automatic telephone dialing system in a manner that does not comply with such standards; or

(B) to use a computer or other electronic device to send any message via a telephone facsimile machine unless such person clearly marks, in a margin at the top or bottom of each transmitted page of the message or on the first page of the transmission, the date and time it is sent and an identification of the business, other entity, or individual sending the message and the telephone number of the sending machine or of such business, other entity, or individual.

(2) Telephone facsimile machines

The Commission shall revise the regulations setting technical and procedural standards for telephone facsimile machines to require that any such machine which is manufactured after one year after December 20, 1991, clearly marks, in a

margin at the top or bottom of each transmitted page or on the first page of each transmission, the date and time sent, an identification of the business, other entity, or individual sending the message, and the telephone number of the sending machine or of such business, other entity, or individual.

(3) Artificial or prerecorded voice systems

The Commission shall prescribe technical and procedural standards for systems that are used to transmit any artificial or prerecorded voice message via telephone. Such standards shall require that—

(A) all artificial or prerecorded telephone messages (i) shall, at the beginning of the message, state clearly the identity of the business, individual, or other entity initiating the call, and (ii) shall, during or after the message, state clearly the telephone number or address of such business, other entity, or individual; and

(B) any such system will automatically release the called party's line within 5 seconds of the time notification is transmitted to the system that the called party has hung up, to allow the called party's line to be used to make or receive other calls.

(e) Effect on State law

(1) State law not preempted

Except for the standards prescribed under subsection (d) of this section and subject to paragraph (2) of this subsection, nothing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restric-

tive intrastate requirements or regulations on, or which prohibits—

(A) the use of telephone facsimile machines or other electronic devices to send unsolicited advertisements;

(B) the use of automatic telephone dialing systems;

(C) the use of artificial or prerecorded voice messages; or

(D) the making of telephone solicitations.

(2) State use of databases

If, pursuant to subsection (c)(3) of this section, the Commission requires the establishment of a single national database of telephone numbers of subscribers who object to receiving telephone solicitations, a State or local authority may not, in its regulation of telephone solicitations, require the use of any database, list, or listing system that does not include the part of such single national database that relates to such State.

(f) Actions by States

(1) Authority of States

Whenever the attorney general of a State, or an official or agency designated by a State, has reason to believe that any person has engaged or is engaging in a pattern or practice of telephone calls or other transmissions to residents of that State in violation of this section or the regulations prescribed under this section, the State may bring a civil action on behalf of its residents to enjoin such calls, an action to recover for actual monetary loss or receive $500 in damages for each violation, or

both such actions. If the court finds the defendant willfully or knowingly violated such regulations, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under the preceding sentence.

(2) Exclusive jurisdiction of Federal courts

The district courts of the United States, the United States courts of any territory, and the District Court of the United States for the District of Columbia shall have exclusive jurisdiction over all civil actions brought under this subsection. Upon proper application, such courts shall also have jurisdiction to issue writs of mandamus, or orders affording like relief, commanding the defendant to comply with the provisions of this section or regulations prescribed under this section, including the requirement that the defendant take such action as is necessary to remove the danger of such violation. Upon a proper showing, a permanent or temporary injunction or restraining order shall be granted without bond.

(3) Rights of Commission

The State shall serve prior written notice of any such civil action upon the Commission and provide the Commission with a copy of its complaint, except in any case where such prior notice is not feasible, in which case the State shall serve such notice immediately upon instituting such action. The Commission shall have the right (A) to intervene in the action, (B) upon so intervening, to be heard on all matters arising therein, and (C) to file petitions for appeal.

(4) Venue; service of process

Any civil action brought under this subsection in a district court of the United States may be brought in the district wherein the defendant is found or is an inhabitant or transacts business or wherein the violation occurred or is occurring, and process in such cases may be served in any district in which the defendant is an inhabitant or where the defendant may be found.

(5) Investigatory powers

For purposes of bringing any civil action under this subsection, nothing in this section shall prevent the attorney general of a State, or an official or agency designated by a State, from exercising the powers conferred on the attorney general or such official by the laws of such State to conduct investigations or to administer oaths or affirmations or to compel the attendance of witnesses or the production of documentary and other evidence.

(6) Effect on State court proceedings

Nothing contained in this subsection shall be construed to prohibit an authorized State official from proceeding in State court on the basis of an alleged violation of any general civil or criminal statute of such State.

(7) Limitation

Whenever the Commission has instituted a civil action for violation of regulations prescribed under this section, no State may, during the pendency of such action instituted by the Commission, subsequently institute a civil action against any defendant named in the Commission's complaint for any violation as alleged in the Commission's complaint.

(8) "Attorney general" defined

As used in this subsection, the term "attorney general" means the chief legal officer of a State.

(g) Junk fax enforcement report

The Commission shall submit an annual report to Congress regarding the enforcement during the past year of the provisions of this section relating to sending of unsolicited advertisements to telephone facsimile machines, which report shall include—

(1) the number of complaints received by the Commission during such year alleging that a consumer received an unsolicited advertisement via telephone facsimile machine in violation of the Commission's rules;

(2) the number of citations issued by the Commission pursuant to section 503 of this title during the year to enforce any law, regulation, or policy relating to sending of unsolicited advertisements to telephone facsimile machines;

(3) the number of notices of apparent liability issued by the Commission pursuant to section 503 of this title during the year to enforce any law, regulation, or policy relating to sending of unsolicited advertisements to telephone facsimile machines;

(4) for each notice referred to in paragraph (3)—

(A) the amount of the proposed forfeiture penalty involved;

(B) the person to whom the notice was issued;

(C) the length of time between the date on which the complaint was filed and the date on which the notice was issued; and

(D) the status of the proceeding;

(5) the number of final orders imposing forfeiture penalties issued pursuant to section 503 of this title during the year to enforce any law, regulation, or policy relating to sending of unsolicited advertisements to telephone facsimile machines;

(6) for each forfeiture order referred to in paragraph (5)—

(A) the amount of the penalty imposed by the order;

(B) the person to whom the order was issued;

(C) whether the forfeiture penalty has been paid; and

(D) the amount paid;

(7) for each case in which a person has failed to pay a forfeiture penalty imposed by such a final order, whether the Commission referred such matter for recovery of the penalty; and

(8) for each case in which the Commission referred such an order for recovery—

(A) the number of days from the date the Commission issued such order to the date of such referral;

(B) whether an action has been commenced to recover the penalty, and if so, the number of days from the date the Commission referred such order for recovery to the date of such commencement; and

(C) whether the recovery action resulted in collection of any amount, and if so, the amount collected.

Telephone Consumer Protection Act, Pub. L. No. 102-243, § 2, 105 Stat. 2394-95 (1991), 47 U.S.C. § 227 note (Congressional findings)

SEC. 2. FINDINGS.

The Congress finds that:

(1) The use of the telephone to market goods and services to the home and other businesses is now pervasive due to the increased use of cost-effective telemarketing techniques.

(2) Over 30,000 businesses actively telemarket goods and services to business and residential customers.

(3) More than 300,000 solicitors call more than 18,000,000 Americans every day.

(4) Total United States sales generated through telemarketing amounted to $435,000,000,000 in 1990, a more than four-fold increase since 1984.

(5) Unrestricted telemarketing, however, can be an intrusive invasion of privacy and, when an emergency or medical assistance telephone line is seized, a risk to public safety.

(6) Many consumers are outraged over the proliferation of intrusive, nuisance calls to their homes from telemarketers.

(7) Over half the States now have statutes restricting various uses of the telephone for marketing, but

telemarketers can evade their prohibitions through interstate operations; therefore, Federal law is needed to control residential telemarketing practices.

(8) The Constitution does not prohibit restrictions on commercial telemarketing solicitations.

(9) Individuals' privacy rights, public safety interests, and commercial freedoms of speech and trade must be balanced in a way that protects the privacy of individuals and permits legitimate telemarketing practices.

(10) Evidence compiled by the Congress indicates that residential telephone subscribers consider automated or prerecorded telephone calls, regardless of the content or the initiator of the message, to be a nuisance and an invasion of privacy.

(11) Technologies that might allow consumers to avoid receiving such calls are not universally available, are costly, are unlikely to be enforced, or place an inordinate burden on the consumer.

(12) Banning such automated or prerecorded telephone calls to the home, except when the receiving party consents to receiving the call or when such calls are necessary in an emergency situation affecting the health and safety of the consumer, is the only effective means of protecting telephone consumers from this nuisance and privacy invasion.

(13) While the evidence presented to the Congress indicates that automated or prerecorded calls are a nuisance and an invasion of privacy, regardless of the type of call, the Federal Communications Commission should have the flexibility to design different rules for those types of automated or prerecorded calls that it finds are not considered a nuisance or invasion of pri-

vacy, or for noncommercial calls, consistent with the free speech protections embodied in the First Amendment of the Constitution.

(14) Businesses also have complained to the Congress and the Federal Communications Commission that automated or prerecorded telephone calls are a nuisance, are an invasion of privacy, and interfere with interstate commerce.

(15) The Federal Communications Commission should consider adopting reasonable restrictions on automated or prerecorded calls to businesses as well as to the home, consistent with the constitutional protections of free speech.

RESPONDENT'S BRIEF

RECORD
AND
BRIEFS

No. 10-1195

In the Supreme Court of the United States

MARCUS D. MIMS,

Petitioner,

v.

ARROW FINANCIAL SERVICES, LLC,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

The Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 3(b), 105 Stat. 2394, 2396, provides that a private plaintiff "may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State, an action" for damages in the amount of $500 per violation or injunctive relief. The question presented is whether a plaintiff seeking relief under this unique private right of action may bypass state court and bring an action in federal district court under 28 U.S.C. § 1331.

RULE 29.6 STATEMENT

Arrow Financial Services, LLC is wholly owned by AFS Holdings, LLC, which in turn is wholly owned by Sallie Mae, Inc., which in turn is wholly owned by SLM Corp., a publicly traded company.

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INTRODUCTION

Hardly anyone likes receiving unsolicited automated telephone calls and facsimiles. And this fact of life has not escaped the notice of the States. By 1991, more than 40 States had enacted legislation to combat this problem in one way or another, as the number of telemarketing calls reached more than 18 million per day. The States found, however, that their *intra*state restrictions on abusive telemarketing practices could be evaded by telemarketers' *inter*state operations. *See* 47 U.S.C. § 227 note (Congressional Findings) (reproduced at Pet. Br. 23a-24a). So Congress acted to fill this interstitial void. This case concerns the contours of the private right of action that Congress created in the Telephone Consumer Protection Act (TCPA) to address this perceived enforcement gap and, in particular, whether Congress intended the TCPA private right of action to be enforceable in federal court under 28 U.S.C. § 1331.

The private right of action at issue states that persons "may, *if otherwise permitted by the laws or rules of court of a State*, bring in an appropriate court *of that State*" an action based on violation of the TCPA. 47 U.S.C. § 227(b)(3) (emphasis added). The TCPA's private right of action appears to be *sui generis*—and uniquely state-law centered—in terms of how it is framed. But there is no requirement that Congress must adopt the same approach to every problem. Nor must Congress turn to federal courts—instead of state courts—to enforce rights enabled by federal law. The provision at issue takes an innovative approach by creating a federal claim that operates like state law and provides an example of true cooperative federalism—of Congress helping the States to help themselves.

As with any statute, this Court must give effect to Congress's intent in establishing the TCPA's private right of action. The text, structure, legislative history, and purpose of the TCPA, as well as other indicia of congressional intent, confirm that Congress intended private TCPA actions to be brought in state court where "permitted by" state law—just as Congress said in § 227(b)(3). In creating this private right of action and giving States control over the scope and availability of such claims, Congress did not intend to allow plaintiffs simply to bypass state court by invoking § 1331. Nor is there any evidence that Congress sought to open the federal courts to a potential influx of private TCPA claims stemming from *millions* of telemarketing calls each day. To the contrary, the available evidence suggests that Congress believed that private TCPA actions—with damages set at $500 per violation—would be most appropriate for state small claims court. *Infra* at 5.

It is true, as petitioner observes (at 11), that the unique private right of action that Congress created is "dependent on the grace of the state courts." But Congress explicitly contemplated that result by directing that claims could be brought in state court "if permitted by" state law. There is no reason to presume that States, or state courts, are not capable of responsibly overseeing private TCPA claims. And petitioner has provided no basis for this Court to dismantle the innovative approach that Congress took in the TCPA—and greatly expand the scope of the limited private action it created—by holding that private TCPA claims may be brought in federal court *regardless* of whether or to what extent they are "permitted by" state laws or rules of court.

STATEMENT OF THE CASE

1. For better or worse, American businesses and entrepreneurs have never been shy about marketing their goods and services. In the telecommunications age, there are enormous opportunities for marketing, but also opportunities for abuse. In the past few decades, the use of telemarketing has become pervasive. Thousands of solicitors call tens of millions of American households each day. *See* 47 U.S.C. § 227 note. Indeed, it has been estimated that there are some 6.57 *billion* telemarketing transmissions each year. *International Sci. & Tech. Inst., Inc. v. Inacom Commc'ns, Inc.*, 106 F.3d 1146, 1157 (4th Cir. 1997) (emphasis added). Many of those transmissions are not welcome by the individuals or homes that receive them.

The States, no doubt spurred by annoyed residents, were the first to take action to address this phenomenon. By 1991, when the TCPA was enacted, more than 40 States had already legislated limits on the use of automatic-dialer recorded-message players or otherwise restricted telemarketing practices. S. Rep. No. 102-178, at 2 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1968, 1970. Those state laws had "had limited effect" (*id.*), however, because it was believed that "telemarketers [could] easily avoid the restrictions of State law, simply by locating their phone centers out of state," H.R. Rep. No. 102-317, at 9 (1991). As a result, "[m]any States ha[d] expressed a desire for Federal legislation ... to supplement their restrictions on intrastate calls." S. Rep. No. 102-178, at 2.

Congress responded in the TCPA, which was enacted in 1991 as part of an amendment to the Communications Act of 1934. Pub. L. No. 102-243, § 3(a), 105 Stat. 2394, 2395. The TCPA prohibits

certain unsolicited telemarketing calls and facsimile advertisements and restricts the use of automatic dialers and prerecorded messages in non-emergency calls to cell phones. *See* 47 U.S.C. § 227(b)(1)-(2). In passing the law, Congress specifically found that "Federal law is needed" because "telemarketers can evade [state] prohibitions through interstate operations." 47 U.S.C. § 227 note. Thus, "Congress intended the TCPA to provide 'interstitial law preventing evasion of state law by calling across state lines.'" *Gottlieb v. Carnival Corp.*, 436 F.3d 335, 342 (2d Cir. 2006) (citation omitted). And to do that, Congress "sought to put the TCPA on the same footing as state law, essentially supplementing state law where there were perceived jurisdictional gaps." *Id.*

The TCPA contains distinct remedial provisions for private parties and government entities. Congress created a private right of action stating that plaintiffs "may, *if otherwise permitted by the laws or rules of court of a State*, bring in an appropriate court *of that State*" an action for actual damages or statutory damages of $500 per violation, and injunctive relief. 47 U.S.C. § 227(b)(3) (emphasis added). Congress authorized state attorneys general to bring civil actions for damages and injunctive relief whenever a State "has reason to believe that any person has engaged or is engaging in a pattern or practice of telephone calls or other transmissions to residents of that State in violation of" the TCPA, *id.* § 227(f)(1), and specified that the federal courts would have "exclusive jurisdiction" over those actions, *id.* § 227(f)(2). And Congress authorized the Federal Communications Commission (FCC) to intervene as of right in actions initiated by state attorneys general. *Id.* § 227(f)(3).

Senator Hollings, who sponsored the law, explained that the private-right-of-action provision "would allow consumers to bring an action *in State court* against any entity that violates the bill." 137 Cong. Rec. 30,821 (1991) (emphasis added). He further expressed his "hope that States will make it as easy as possible for consumers to bring such actions, preferably in [state] small claims court," *id.*, observing that

> [s]mall claims court, or a similar court, would allow the consumer to appear before the court without an attorney. The amount of damages in this legislation is set to be fair to both the consumer and the telemarketer. However, it would defeat the purposes of the bill if the attorneys' costs to consumers bringing an action were greater than the potential damages.

Id. at 30,821-22. He added that the bill "permits the State attorneys general to enforce the provisions of the bill *in Federal court.*" *Id.* at 30,822 (emphasis added).

Not long after the statute became law, the FCC issued a Consumer Alert "to answer questions consumers may have about [the new law and related regulations]." Telephone Solicitations, Autodialed and Artificial or Prerecorded Voice Message Telephone Calls, and the Use of Facsimile Machines, 8 FCC Rcd. 480, 480 (Jan. 11, 1993). The Commission explained that a citizen who receives a live telephone solicitation, automated or prerecorded voice call, or unsolicited fax advertisement in apparent violation of the TCPA or the FCC's rules "may take the following actions": (1) "contact the solicitor or business directly" and ask them to stop the calls; (2) "*file suit in state court (if your state permits such actions)* to stop such calls and/or file suit for actual monetary loss"; or (3)

"request FCC enforcement action on suspected violations of FCC rules." *Id.* at 481 (emphasis added). In addition, the notice explained, "states can initiate a civil action in federal district court against any person or entity that engages in a pattern or practice of violations of the TCPA or the FCC rules." *Id.*

2. In August 2009, petitioner filed a complaint in the United States District Court for the Southern District of Florida, alleging that respondent, Arrow Financial Services, LLC (Arrow), had placed telephone calls to his cell phone without his prior consent using an auto-dialer system, in an effort to collect a delinquent debt from petitioner. The complaint alleged violations of the TCPA, the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692 *et seq.*, and the Florida Consumer Collection Practices Act (FCCPA), Fla. Stat. § 559.55 *et seq.* JA 8-20. It asserted subject-matter jurisdiction under 28 U.S.C. § 1331 and other provisions not relevant here. JA 8; Pet. 12.[1]

The parties stipulated to dismissal of petitioner's FDCPA and FCCPA claims. Arrow then moved to dismiss petitioner's TCPA claim for lack of subject matter jurisdiction under § 1331. Relying on the settled law of the Eleventh Circuit and five other circuits, the district court dismissed the case for want of subject matter jurisdiction. Pet. App. 7a. The Eleventh Circuit summarily affirmed on the basis of existing circuit precedent. *Id.* at 2a.

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[1] Petitioner has never argued that he could not have maintained this suit in a Florida state court. *Cf.* Pet. 11-12 n.5; Opp. 3 n.1.

SUMMARY OF ARGUMENT

The court of appeals properly held that the federal courts lack federal-question jurisdiction under 28 U.S.C. § 1331 over private TCPA claims.

The uniquely state-centered private right of action that Congress created in the TCPA explicitly authorizes bringing private claims only in state court. Unlike the statute in *Tafflin v. Levitt*, 493 U.S. 455 (1990), Congress did not generally provide that TCPA claims "may be brought" in state court. It carefully qualified, and limited, the private right by specifying that such claims may be brought in state court—"if otherwise permitted by the laws or rules of court of a State." The distinctive, state-law—and state-court—language that Congress used underscores that Congress had a particular remedial scheme in mind.

Petitioner's interpretation renders that language superfluous, because it is black-letter law that the state courts would have concurrent jurisdiction over private TCPA claims if Congress had said *nothing* about bringing such claims in state court. The only way to give meaningful effect to the unique language that Congress used is to hold that private TCPA claims are tantamount to state claims that must be filed in state court—as "permitted by" state laws or rules of court.

The unusual limitation that Congress imposed in the TCPA (making a private right of action contingent on the laws or rules of court of the States) is inconsistent with the notion that Congress intended for federal-question jurisdiction to extend to *all* private TCPA claims, because the existence of the TCPA's private right to sue itself is explicitly tied to state law. But the limitation is perfectly consistent with the express purpose of the TCPA—to ensure that the

States could address the problem of *inter*state calls that violated the Act, where the States themselves chose to address this problem but were frustrated by their inability to enforce their laws for interstate calls.

Other considerations reinforce the conclusion that Congress did not intend for private TCPA claims to be subject to general federal-question jurisdiction. The broader context of the statute underscores that Congress intentionally drew jurisdictional lines between federal and state court depending on the party bringing suit. Likewise, the legislative history shows that Congress did not just have in mind *state court* litigation for private TCPA claims, but preferred channeling such claims to state *small claims court* to ensure that the costs of litigating TCPA claims would not swallow the relatively small damages at stake. Petitioner's position not only would allow plaintiffs to bypass state court, but would also allow defendants to *force* consumers into likely more costly federal court litigation by removing actions filed in state court.

Confining private TCPA claims to state court—and giving States control over the scope and availability of such claims—is consistent with the enormous potential volume of such claims. As Congress found when it passed the TCPA, Americans receive *millions* of telemarketing calls and faxes each day. There is no reason to believe that, in establishing a carefully limited and state court-focused private right, Congress intended to subject the *federal* courts to a potential influx of private, $500-per-violation claims. The contemporaneous views of the agency charged with administering the TCPA further reinforce the conclusion that Congress intended private TCPA claims to be brought only in state court.

The mechanism that Congress expresses to enforce a private right is an integral component of the private right it has created. Petitioner's interpretation would transform, and expand, the private right that Congress created in two fundamental respects. Even though Congress explicitly authorized bringing private TCPA claims only in state court, petitioner's position would allow any plaintiff to bring any private TCPA claim in federal court under § 1331. And even though Congress explicitly limited the right by authorizing States to define the contours and availability of TCPA claims, petitioner's position would make the federal courts open for private TCPA claims *regardless* of whether they would be allowed by the courts of a State. Adopting petitioner's interpretation would therefore require a departure from this Court's precedents emphasizing that Courts should take great care in construing private rights of action. Indeed, petitioner is effectively asking this Court to infer a new private right of action authorizing plaintiffs to bring TCPA claims in *federal* court—*without regard to* state law.

Petitioner says he does not wish "to denigrate the important objective served by Congress's authorization for state courts to entertain TCPA claims." Pet. Br. 35. But his position does something worse. It takes a statute that tries out an innovative, cooperative federalism approach to allowing the States to help themselves in addressing a particular problem and transforms it into just another federal cause of action. The court of appeals properly rejected that position.

ARGUMENT

FEDERAL COURTS LACK FEDERAL-QUESTION JURISDICTION UNDER 28 U.S.C. § 1331 OVER PRIVATE TCPA CLAIMS

Federal courts are courts of limited jurisdiction—jurisdiction exists only insofar as it is conveyed by Congress. *See Sheldon v. Sill*, 49 U.S. (8 How.) 441, 449 (1850). Petitioner's brief is devoted largely to a proposition that is not contested—that 28 U.S.C. § 1331 confers a broad grant of general federal-question jurisdiction on the federal courts. *See* Pet. Br. 1, 10, 12-26. To that end, petitioner delves into the history of the federal-question jurisdiction statute and discusses at length the *general* availability of federal-question jurisdiction with respect to claims "arising under" federal law. But ultimately, even petitioner recognizes (as he must) that "Congress can and does make exceptions to statutes conferring jurisdiction on the federal district courts, including § 1331's grant of federal-question jurisdiction." Pet. Br. 24-25. And in that regard, the question before the Court is not whether Congress *could* allow for federal-question jurisdiction over private actions under the TCPA, but rather whether it has. *Cf. Shoshone Mining Co. v. Rutter*, 177 U.S. 505, 506 (1900) ("The question ... is not one of the power of Congress, but of its intent.").

In addressing that question, petitioner proceeds from page one of its brief as if the TCPA private right of action at issue in this case were "precisely" like any other "cause of action of created by federal law." But it is not—not even close. As the lower courts have acknowledged, the TCPA private right of action possesses an "unusual constellation of statutory features." *Chair King, Inc. v. Houston Cellular Corp.*,

131 F.3d 507, 512-13 (5th Cir. 1997). Those features include (1) an express creation of a private right of action only as "'otherwise permitted by the laws or rules of court of a State'"; (2) an express direction that such actions may be brought "'in an appropriate court of that State'" as authorized by state law; and (3) a jurisdictional grant to federal courts to entertain actions brought by *state attorneys general* (with no reference to federal court jurisdiction for private claims). And the combination of these features makes the TCPA private right of action truly "*sui generis*." *Gottlieb*, 436 F.3d at 342 n.8.

The upshot is that Congress created a private right of action that "behaves like state law," *Bonime v. Avaya, Inc.*, 547 F.3d 497, 501 (2d Cir. 2008), and is thus subject to state law and rules of court. That unique approach was no doubt based in part on the extraordinary volume of telecommunications presenting potential claims (millions a day), and Congress's desire to ensure that States had the authority to regulate such claims. Holding that federal-question jurisdiction exists to entertain private TCPA claims would allow plaintiffs to evade the limits established by Congress and bypass state court—and ignore state law—altogether. There is no evidence that Congress intended that result. Instead, the signs point to the conclusion that Congress intended to do just what it said: create a limited private right of action that was enforceable in state court—to the extent "permitted by [state] laws or rules of court."

A. The Text Of The TCPA Private Right Of Action Explicitly Contemplates Bringing Such Actions Only In State Court

For jurisdictional issues, just as for other matters involving the search for Congress's intent, "[s]tatutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Engine Mfrs. Ass'n v. South Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004). Section 227(b)(3) of the TCPA—the key statutory provision at issue—provides in relevant part:

> A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State— ... an action [for damages and injunctive relief].

47 U.S.C. § 227(b)(3); Pet. Br. 10a.

1. Petitioner grounds his reading of § 227(b)(3) on Congress's use of "may" and emphasizes the permissive nature of *that* word. Pet. Br. 1. But in doing so he loses sight of one of the most fundamental maxims of statutory interpretation: "Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used ...." *NLRB v. Federbush Co.*, 121 F.2d 954, 957 (2d Cir. 1941) (L. Hand, J.). Here, Congress qualified—and limited—its use of "may" in critical respects in the next clause. As Judge Calabresi has observed, "[u]nder well-established rules of interpretation, the language of the 'if otherwise permitted' clause modifies *and limits* the word 'may.'" *Bonime*, 547 F.3d at 503 (concurring) (emphasis added).

"May" is not the same as "May, *if*." The language that Congress used here is the same as saying "may, provided that ....," or "may, to the extent that ...."

The way that Congress qualified "may" makes the private right of action uniquely state law—and, indeed, state *court*—focused. In creating the TCPA private right of action, Congress explicitly authorized only actions brought "in an appropriate court of th[e] State," and only "if otherwise permitted by the laws or rules of court of a State." The fact that Congress expressly conditioned the private right of action not only on the "laws" of a State but on the "rules of court of a State" underscores that Congress intended state courts to play an indispensable role in shaping the right. It also is an express sign that Congress did not envision federal courts entertaining such claims under § 1331.

Federal courts lack lawmaking authority and thus could not substantively alter the contours of TCPA claims. And except as called for in *diversity* cases for *procedural* rules (*see Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938)), federal courts generally are not accustomed to applying state "rules of court." Indeed, even in diversity cases, this Court has struggled in determining when state rules governing litigation may trump federal rules. *See, e.g., Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1444-47 (2010). At a minimum, even if federal courts were generally required to follow state "rules of court" in adjudicating private TCPA claims under § 1331, petitioner's position would almost certainly create problems in deciding *which* rules of court to follow. *Cf. Holster v. Gatco, Inc.*, 131 S. Ct. 1575, 1576 (2010) (Scalia, J., concurring). And adopting petitioner's position (*see* Pet. Br. 44-48) that substantive state

limits on TCPA claims—whether from state laws or rules of court—are not binding on federal courts adjudicating such claims under § 1331 would eliminate an express limit on the private right of action.

2. "[O]ne of the most basic interpretive canons" is "that '[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant ....'" *Corley v. United States*, 129 S. Ct. 1558, 1566 (2009) (quoting *Hibbs v. Winn*, 542 U.S. 88, 101 (2004)); *see TRW, Inc. v. Andrews*, 534 U.S. 19, 31 (2001) ("It is a 'cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)). The only way to give meaningful effect to the limitations expressed in § 227(b)(3) is to read the statute as authorizing private TCPA actions only in state court, as "permitted by" state law. It is "'black letter law'" that state courts generally have concurrent jurisdiction over federal causes of action. *Tafflin v. Levitt*, 493 U.S. 455, 461 (1990) (citation omitted). Congress was surely aware of that background principle when it enacted the TCPA. So there would have been no reason for Congress to go out of its way to frame the TCPA private right of action in terms of state law—and state courts—unless Congress meant the references to state law and state courts to limit the private right of action.

Petitioner hypothesizes two reasons why Congress would have included this language, even though it purportedly did not intend to limit private TCPA claims to state court. Both are far-fetched. First, petitioner suggests that Congress wanted to "put[] to

rest any suggestion that *federal* jurisdiction [over such claims] might be exclusive." Pet. Br. 37. But there is no indication whatsoever that Congress was worried about this. Nor was there any reason to worry given the black-letter rule that state courts have concurrent jurisdiction over federal claims. Second, petitioner suggests that Congress may have wanted to address the "nondiscrimination principle of *Testa v. Katt* [330 U.S. 386 (1947),]" though he refuses to say how, or even if, Congress actually altered *Testa*'s rule by using this language. *See* Pet. Br. 38. Again, there is no evidence that Congress had this particular concern in mind.

In fact, Congress's focus on state law and state courts in § 227(b)(3) is perfectly consistent with its undeniable objective in enacting the TCPA. Because of the perceived enforcement loophole with respect to *inter*state transmissions, "Congress ... sought to put the TCPA on the same footing as state law, essentially supplementing state law where there were perceived jurisdictional gaps." *Gottlieb*, 436 F.3d at 342; *Bonime*, 547 F.3d at 500 (recognizing "Congress's innovation in creating a federal claim which behaved like state law"). As the Texas Supreme Court has observed, "the reason Congress created the TCPA private right of action at all was 'out of solicitude for states which were thwarted in their attempts to stop unwanted [interstate] telemarketing.'" *The Chair King, Inc. v. GTE Mobilnet of Houston, Inc.*, 184 S.W. 3d 707, 716 (Tex. 2006) (quoting *International Sci. & Tech. Inst.*, 106 F.3d at 1154). Confining private TCPA actions to state court—as permitted by state law and rules of court—fits hand in glove with that objective.

The Court has two options before it. The first—interpreting § 227(b)(3) as authorizing private TCPA

actions only in state court—gives effect to the distinctive state-law and state-court focused language that Congress used and fits naturally with its express objective of closing a perceived interstitial gap at the state level (while leaving States free to decide what TCPA claims to allow). The second—interpreting § 227(b)(3) as permitting private TCPA actions in federal court under § 1331 *or* state court—renders the unique state-focused language that Congress used for all practical purposes gratuitous and is based on the hypothesis that Congress was trying to achieve objectives that were either entirely unnecessary (because of the black-letter rule that state courts have concurrent jurisdiction over federal claims) or unstated and implausible. This Court should adopt the interpretation that gives effect to the entire text of the law that Congress enacted and assumes that Congress acted to address the genuine problem it identified in its own findings (*see* Pet. Br. 23a-24a).

3. *Tafflin*, the case on which petitioner principally relies (*see* Pet. Br. 10-11, 27-30, 42, 45), does not compel a different conclusion. It is distinguishable in at least two fundamental respects. First, the text of the RICO statute at issue in *Tafflin* differs in critical respects from the text of § 227(b)(3) of the TCPA. The RICO statute provides that "[a]ny person injured in his business or property by reason of a violation of [RICO] *may sue therefor* in any appropriate United States district court ..." 18 U.S.C. § 1964(c) (emphasis added). In other words, *Tafflin* involved the effect of Congress's essentially unadorned use of "may"—and not the "may, *if*" formulation that Congress used in the TCPA provision at issue here, by which Congress unmistakably took pains to tie the private right to state

law and state courts. Petitioner argues (at 29) that the TCPA has "exactly the same features" as the statute in *Tafflin*, but it has *none* of the express limits found in the TCPA's extraordinary "may, if" clause.

Second, the jurisdictional circumstances of *Tafflin* are the "reverse" of those here. *International Sci. & Tech. Inst.*, 106 F.3d at 1152. The question in *Tafflin* was whether Congress's reference to claims in federal court was intended to preclude claims in *state* court, whereas the question here is whether Congress's reference to claims in state court was intended to preclude claims in *federal* court. The Court's decision in *Tafflin* is grounded on the "deeply rooted presumption in favor of concurrent state court jurisdiction" over federal claims. 493 U.S. at 459; *see id.* at 470 (Scalia, J., joined by Kennedy, J., concurring) ("It ... takes an affirmative act of power under the Supremacy Clause to oust the States of jurisdiction" over federal claims); *see Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478 (1981). That constitutional principle was a focus of the briefing and argument in *Tafflin*. But it does not apply when the question is whether Congress intended to allow claims in *federal* court by establishing a carefully-circumscribed private right of action in *state* court. Indeed, the background presumption of constitutional law is *reversed*, because federal courts are courts of *limited* jurisdiction. *See Lockerty v. Phillips*, 319 U.S. 182, 187 (1943).[2]

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[2] In *Tafflin*, the Court also observed that its "review of the legislative history ... reveal[ed] no evidence that Congress even considered the question of concurrent state court jurisdiction over RICO claims, much less any suggestion that Congress affirmatively intended to confer exclusive jurisdiction over such claims on the federal courts." *Tafflin*, 493 U.S. at 461. Here, as

Petitioner's reliance (at 29) on *Yellow Freight System, Inc. v. Donnelly*, 494 U.S. 820 (1990), is similarly misplaced. In *Donnelly* the Court held, for "the reasons set forth in" *Tafflin*, that federal courts do not have exclusive jurisdiction over civil actions brought under Title VII of the Civil Rights Act of 1964. *Id.* at 821. *Donnelly* is distinguishable from this case on the same basic grounds as *Tafflin*. And the same goes for the other cases on which petitioner relies, where Congress's use of "may" or similar language in jurisdictional provisions was not limited in the unique and unmistakable way that it is in the TCPA. *See, e.g.*, *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308 (2005); *Breuer v. Jim's Concrete of Brevard, Inc.*, 538 U.S. 691 (2003); *Verizon Maryland, Inc. v. Public Serv. Comm'n*, 535 U.S. 635 (2002).[3]

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discussed below, the legislative history strongly supports the conclusion that Congress intended private TCPA claims to be brought only in state court—and, indeed, had a preference for States to funnel these suits to small claims court. That history is inconsistent with the notion that Congress intended to open the federal courts under § 1331 to private claims under the TCPA.

[3] *Grable & Sons* considered whether a state-law quiet title action against a federal tax sale purchaser gave rise to federal-question jurisdiction under § 1331. The Court held that a state law claim may, in some circumstances, be sufficient to trigger federal-question jurisdiction when it implicates a federal issue, but "only if federal jurisdiction is consistent with congressional judgment about the sound division of labor between state and federal courts." 545 U.S. at 313-14. *Grable & Sons* did not involve the interpretation of *any* federal cause of action, much less one that affirmatively assigns jurisdiction to state courts. *Verizon Maryland* concerned a provision of the Telecommunications Act providing that "any party aggrieved by" certain state agency decisions "may bring an action in an appropriate *Federal district court*." 47 U.S.C. § 252(e)(6) (emphasis added). Because

This Court has previously read the use of "may," in context, to have an exclusionary, or mandatory, connotation (*e.g.*, "may only" or "may, if"). *See, e.g.*, *Mercantile National Bank at Dallas v. Langdeau*, 371 U.S. 555, 560 (1963) (rejecting argument that use of "may" was merely permissive with respect to provision of the National Banking Act of 1864, providing that "'suits ... may be had [against national banks] ... in any state, county, or municipal court in the country or city in which said association is located, having jurisdiction in similar cases'") (citation omitted); *see also Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co.*, 529 U.S. 193, 198 (2000) ("[T]he mere use of 'may' is not necessarily conclusive of congressional intent to provide for a permissive or discretionary authority."); *United States v. Rodgers*, 461 U.S. 677, 706 (1983) ("The word 'may,' when used in a statute usually

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§ 252(e)(6) explicitly provided for a cause of action "in an appropriate Federal district court," there was no question that federal courts had jurisdiction if there was a right to relief at all. The Court concluded that nothing in § 252(e)(6) could be read to prescribe (as the TCPA does) a "distinctive review mechanism" that displaces the general federal-question statute. 535 U.S. at 644. Finally, *Breuer* involved the Fair Labor Standards Act of 1938, which provides that a private suit "'may be maintained ... in any Federal or State court of competent jurisdiction.'" 538 U.S. at 693 (quoting 52 Stat. 1069, as amended, 29 U.S.C. § 216(b)). The issue was whether Congress prohibited *removal* to federal court under 28 U.S.C. § 1441(a), by specifying that suits "may be maintained." Because federal-question jurisdiction indisputably covers such claims, and because the Court had long interpreted § 1441(a) to authorize removal in any case that could have been brought in federal court under § 1331, this Court reasoned that Congress's use of the word "maintain," without more, did not evince congressional intent to prohibit removal. *See id.* at 694-700.

implies some degree of discretion," but "[t]his common-sense principle of statutory construction ... can be defeated by indications of legislative intent to the contrary or by obvious inferences from the structure and purpose of the statute"). Here, the distinctive language that Congress used in § 227(b)(3) to qualify and limit its use of "may" likewise counsels strongly in favor of reading the private right of action as requiring any claims to be brought in state courts—and "in those courts alone." *Langdeau*, 371 U.S. at 560.

B. Other Tools Of Statutory Interpretation Bolster The Conclusion That Congress Intended Private TCPA Claims To Be Brought Only In State Court

The text of the TCPA private right of action itself compels the conclusion that Congress did not intend to allow for general federal-question jurisdiction over TCPA claims. But several other tools of statutory construction bolster that conclusion.

1. The "broader context of the statute as a whole," *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997), confirms that Congress did not intend to confer federal jurisdiction over private actions under the TCPA. Congress drew clear jurisdictional lines in the TCPA depending on the party bringing suit. In contrast to the private right of action, Congress gave the federal courts exclusive jurisdiction when the action was brought by a state attorney general. 47 U.S.C. § 227(f)(1), (2). The juxtaposition between these parallel remedial and enforcement schemes—one that refers only to actions in state court (§ 227(b)(3)), and another that refers only to actions in federal court (§ 227(f)(1), (2))—makes clear that Congress had different jurisdictional regimes in mind.

That conclusion is reinforced by the fact that elsewhere in the Communications Act where Congress intended to authorize concurrent federal and state jurisdiction, it did so explicitly. Indeed, in every other private right of action in Title 47, Congress used language that obviously encompasses both federal and state courts. *See* 47 U.S.C. § 214(c) ("any court of competent jurisdiction"); *id.* § 223(b)(5)(B)(i) ("a court"); *id.* § 415(f) ("in the district court or the State court"); *id.* § 503(a) ("trial court"); *id.* § 504(c) ("a court of competent jurisdiction"); *id.* § 553(c)(1) ("in a United States district court or in any other court of competent jurisdiction"); *id.* § 555(a) ("district court of the United States" or any "State court of general jurisdiction having jurisdiction over the parties"); *id.* § 605(e)(3)(A) ("United States district court or in any other court of competent jurisdiction"); *id.* § 1007(a) ("[a] court"). Especially against this backdrop, the state court-focused language that Congress used in § 227(b) is a powerful indication that Congress had a different—and more limited—jurisdictional scheme in mind.

Moreover, elsewhere in the TCPA itself, where Congress expressly provided for federal court jurisdiction, Congress saw fit to address venue, service of process, and possible conflicts with FCC enforcement efforts. *See id.* § 227(f)(2) (authorizing state attorneys general to bring an action in federal court); *id.* § 227(f)(4), (7) (venue, service of process, conflicts). Section 227(b), by contrast, says nothing about those issues and instead refers only to the "rules of court *of a State.*" In context, then, Congress's silence as to the rules governing the exercise of any federal court jurisdiction for § 227(b) speaks volumes. *Cf. Northwest Airlines, Inc. v. Transport Workers*

Union of Am., 451 U.S. 77, 97 (1981) ("The presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement.").

2. The legislative history likewise strongly confirms that Congress's explicit focus on state courts was intentional. As discussed above, the law's sponsor explained that the law contains a "private right-of-action provision" that "would allow consumers to bring an action in State court against any entity that violates the bill." 137 Cong. Rec. at 30,821 (statement of Sen. Hollings). Senator Hollings went on to explain that "[s]mall claims court or a similar court would allow the consumer to appear before the court without an attorney," and that "it would defeat the purposes of the bill if the attorneys' costs to consumers of bringing an action were greater than the potential damages." *Id.* at 30,821-22.

Petitioner argues (at 41) that Senator Hollings's statement "in no way suggests that federal-court actions are precluded." But the reference to small claims court—which is consistent with the relatively small amounts of damages available in TCPA actions ($500 per violation)—underscores that Congress believed that private actions were best suited for state rather than federal court. The ordinary cost of federal court litigation almost certainly exceeds that of state small claims court—not to mention the cost of securing an attorney (which presumably would not be necessary for small claims court). *See* 137 Cong. Rec. at 30,821.

Moreover, if plaintiffs are free to bring TCPA claims in federal court under § 1331, then defendants sued in state court would be equally free to remove

those cases to federal court under 28 U.S.C. § 1441. *See Breuer*, 538 U.S. at 693-94. It is exceedingly unlikely that a Congress that expressed a preference for making it as easy—and affordable—as possible for individual consumers to file private TCPA claims in state small claims court would have intended for defendants to be able to remove such cases and force consumers into a potentially inconvenient and, in all likelihood, more expensive federal forum. Indeed, given the small stakes in most cases, removal could be used as a mechanism simply to defeat such claims, given that consumers might conclude that fighting it out in federal court is not worth the candle.

In addition, the law's sponsor contrasted the provision of the TCPA "permit[ting] the State attorneys general to enforce the provisions of the bill *in Federal court*," emphasizing the different jurisdictional schemes Congress intended depending on which party brought the action. 137 Cong. Rec. at 30,822 (emphasis added). The different approach for enforcement actions brought by state attorneys general is consistent with the fact that bearing the cost of such litigation presumably would not be as significant a factor for States as it would be for private individuals suing on $500-per-violation claims.

The statutory findings accompanying the TCPA also make clear that Congress understood the potential influx of private claims it might unleash. Congress found that "[m]ore than 300,000 solicitors call more than 18,000,000 Americans every day." Pet. Br. 23a (reproducing 47 U.S.C. § 227 note, § 2(3)). "Congress understandably avoided opening federal courts to the millions of potential private TCPA claims by authorizing private actions only in state courts,

presumably in small claims courts." *International Sci. & Tech. Inst.*, 106 F.3d at 1157; *see The Chair King, Inc.*, 184 S.W. 3d at 715 ("Understandably, Congress opted to close federal courts to the millions of potential private TCPA claims since the overwhelming locus of regulation was centered in the states."). At the same time, Congress made certain that the States would be able to regulate the flow of such claims in their own courts pursuant to "the laws or rules of court of [the] State[s]." 47 U.S.C. § 227(b)(3). Given that Congress was unquestionably aware of the staggering number of communications potentially implicated by the TCPA, it would defy common sense to conclude that Congress intended to open the federal courts to "the millions of private actions that could be filed if only a small portion of each year's 6.57 *billion* telemarketing transmissions were illegal under the TCPA," *International Sci. & Tech. Inst.*, 106 F.3d at 1157—and yet said nothing about the filing of such claims in federal court.[4]

3. Reading the TCPA private right of action as limiting claims to state court—to the extent permitted

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[4] Respondent has been unable to secure statistics on the number of private TCPA claims filed each year. But petitioner himself has stated that the "high volume of calls translates into a high volume of litigation over telemarketing abuses," and that the "question presented arises with *staggering* frequency in cases across the country." Pet. 9 (emphasis added). Moreover, the key point is what Congress reasonably believed, or feared, when it enacted the TCPA. And in view of its findings concerning the sheer magnitude of telemarketing calls each day, it was reasonable for Congress to assume that authorizing private claims based on the proscribed calls and facsimiles would at least create the potential for a large if not huge number of claims. It dealt with that concern by limiting such claims to state courts, and giving the States control over the scope and availability of claims.

by state law—is also consistent with the contemporaneous understanding of the agency charged with administering the Communications Act and with rulemaking authority under the TCPA as well. *See* 47 U.S.C. § 227(b)(2). In a Consumer Alert published shortly after the TCPA became law, the FCC explained that consumers who receive telephone calls or facsimiles in apparent violation of the TCPA or FCC rules "may take the following actions":

> * contact the solicitor or business directly ...
>
> * *file suit in state court (if your state permits such actions)* ...
>
> * request FCC enforcement action on suspected violations of FCC rules.

Telephone Solicitations, Autodialed and Artificial or Prerecorded Voice Message Telephone Calls, and the Use of Facsimile Machines, 8 FCC Rcd. at 481 (emphasis added). The Commission also noted that "*states* can initiate a civil action in *federal district court* against any person or entity that engages in a pattern or practice of violations of the TCPA or the FCC rules." *Id.* (emphasis added).[5]

The contemporaneous views of the FCC on the TCPA's remedial and enforcement scheme—from which the agency, which declined to participate as an amicus in this case, has never retreated—support the conclusion that Congress did not intend for consumers

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[5] The Federal Trade Commission (FTC) appears to share the FCC's views. *See* Proposed Rules, 67 Fed. Reg. 4492, 4518 & n.255 (Jan. 30, 2002) (explaining that "[t]he TCPA permits a person ... to bring an action in an appropriate State court" and noting that "consumers find that using the TCPA's private right of action is a very complex and time-consuming process").

to be able to bring private TCPA claims in federal court under § 1331. *See, e.g., Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421, 466 (1986) ("The agencies' contemporaneous reading of the statute lends strong support to our interpretation."); *FDIC v. Philadelphia Gear Corp.*, 476 U.S. 426, 438-39 (1986) (considering agency's "contemporaneous understanding" of statute it administered).

4. Congress's subsequent actions also cut against petitioner's reading of the TCPA. Congress left the TCPA private right of action intact during the two decades after its enactment as the first six courts of appeals that addressed the question presented all concluded that there is no federal-question jurisdiction over private TCPA claims. That congressional acquiescence is significant, because Congress—which is presumed to know the law in the area in which it legislates—enacted numerous amendments to the TCPA from 1992-2010, yet did not alter the language relevant here.[6] Congress should be presumed to have ratified the prevailing and, until recently, uniform view of the courts of appeals. *See, e.g., General Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 593-94 (2004); *Evans v. United States*, 504 U.S. 255, 268-69 (1992); *cf. Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 130 S. Ct. 1605, 1616 (2010) (Congress presumed to have adopted judicial interpretation of three courts of appeals that had interpreted the Truth in Lending

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[6] *See* Pub. L. No. 111-331, § 2, 124 Stat. 3572, 3572-75 (2010); Pub. L. No. 109-21, §§ 2, 3, 119 Stat. 359, 359-63 (2005); Pub. L. No. 108-187, § 12, 117 Stat. 2699, 2717 (2003); Pub. L. No. 103-414, § 303(a)(11)-(12), 108 Stat. 4279, 4294 (1994); Pub. L. No. 102-556, § 402, 106 Stat. 4181, 4194-95 (1992).

Act's "bona fide error" defense when it used identical language in a later-enacted statute).

C. Allowing Plaintiffs To Bypass State Court Would Transform The Private Right Of Action That Congress Created

As this Court has observed, "[i]t is also an 'elemental canon' of statutory construction that where a statute expressly provides a remedy, courts must be especially reluctant to provide additional remedies." *Karahalios v. National Fed'n of Fed. Employees, Local 1263*, 489 U.S. 527, 532 (1989). The "private remedy" that Congress thought appropriate for TCPA violations is embodied in the "private right of action" that Congress expressed. *Cf. Astra USA, Inc. v. Santa Clara Cnty.*, 131 S. Ct. 1342, 1347 (2011) (availability of "'any private right of action'" turns on Congress's intent to provide a "'private remedy'" (citation omitted)). "[I]n the absence of strong indicia of contrary congressional intent,'" this Court will "'conclude that Congress provided precisely the remedies it considered appropriate.'" *Karahalios*, 489 U.S. at 533 (alteration added). The private remedy that Congress deemed appropriate was authorizing private claims in state court, as permitted by state law.

Petitioner's reading would expand the private right of action well beyond the one that Congress expressed in the TCPA. As this Court has admonished, the "mechanism that Congress cho[oses] to provide for enforcing" a federal statute is an important component of the right it has created. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 289 (2002). The "mechanism" that Congress expressed for enforcing the TCPA private right of action is state court litigation, as "permitted by the laws or rules of court of a State." 47 U.S.C. § 227(b)(3).

As discussed, Congress's decision to select that enforcement mechanism is perfectly consistent with its objectives in enacting the TCPA.

Adopting petitioner's position would expand the private right of action that Congress created in at least two fundamental respects. First, it would allow plaintiffs to bypass state court altogether and file suit in federal court under § 1331—or, conversely, allow defendants to *remove* actions to federal court, even if the plaintiff preferred to litigate in state court. And second, at least as interpreted by petitioner (*see* Pet. Br. 44-48), it would divest States of the authority that Congress granted them to determine whether and to what extent private TCPA claims should be "permitted by the laws or rules of court of a State."

Adopting that interpretation would be inconsistent with this Court's precedents construing private rights of action narrowly. *See, e.g.*, *Gonzaga Univ.*, 536 U.S. at 290-91; *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 121 (2005) ("'[T]he express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others.'" (alteration added)) (quoting *Alexander v. Sandoval*, 532 U.S. 275, 290 (2001)); *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 164 (2008) ("'[T]he jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation ....'") (quoting *Cannon v. University of Chicago*, 441 U.S. 677, 746-747 (1979) (Powell, J., dissenting)); *see also Central Bank of Denver v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 173-74 (1994).

Ordinarily, the existence (or not) of a private right to relief goes to the merits, and does not implicate the power of the federal court to entertain the suit. *See,*

e.g., *Verizon Maryland*, 535 U.S. at 643-44. The private right of action at issue in this case, however, establishes a distinctive enforcement mechanism that is uniquely tied to state law and state courts. Holding that plaintiffs may bypass state court and sue in federal court under § 1331 would transform the private right that Congress created and, in that sense, the merits and jurisdictional inquiries collapse. In any event, if this Court views the availability (or not) of a private right of action to enforce the TCPA in *federal* court as going to the merits, then it should affirm on the alternative ground that there is no basis for inferring a private right of action to enforce the TCPA in federal court, much less a private right (as petitioner conceives it, Pet. Br. 44-48) to secure damages under the TCPA in federal court *regardless* of whether such a claim is allowed under state law. *See United States v. Tinklenberg*, 131 S. Ct. 2007, 2017 (2011) (the Court may consider, and affirm on, alternative grounds).

D. Petitioner Has Provided No Reason To Disregard The Express Intent, Purpose, And Design Of The TCPA's Distinctive Private Right Of Action

The other considerations raised by petitioner provide no reason for holding that private TCPA claims are subject to federal-question jurisdiction.

1. Petitioner argues that, because § 1331 represents a general grant of jurisdiction, Congress must satisfy a clear-statement rule to confine the adjudication of a federal claim to state court. *See* Pet. Br. 25-26; *see id.* at 39 ("clear indication of congressional intent" required). The text of the TCPA private right of action—as well as the purpose and design of that provision and other indicia of

congressional intent discussed above—are sufficient to establish that private TCPA claims are not subject to federal-question jurisdiction, even under a heightened burden. As this Court recently observed, "Congress, of course, need not use magic words in order to speak clearly on [jurisdictional issues]." *Henderson ex rel. Henderson v. Shinseki*, 131 S. Ct. 1197, 1203 (2011). And Congress has spoken sufficiently clearly in the TCPA on the question presented. But petitioner's insistence on a clear-statement rule—and attempt to raise the bar on what is required to show that Congress intended for private TCPA claims to be adjudicated only in state court—should be rejected.

Petitioner's argument depends largely on his reading of *Tafflin* and *Donnelly*. *See* Pet. Br. 27-31. As discussed above, however, those cases are distinguishable in fundamental respects, including insofar as the background constitutional presumption of state-court jurisdiction is not implicated here, and the statutes at issue in those cases lacked anything resembling the kind of distinctive language that qualifies Congress's use of "may" in the TCPA's private-right-of-action provision. *See supra* at 12-20.

More fundamentally, this Court has not imposed the kind of clear-statement rule (or presumption in favor of federal-question jurisdiction) that petitioner asks the Court to apply in this case. In *Verizon Maryland*, for example, in determining whether a statutory provision "eliminate[d] jurisdiction under § 1331," the Court did not frame the analysis around whether Congress had satisfied a clear-statement rule. 535 U.S. at 643-44. Rather, it engaged in a more conventional inquiry into congressional intent, considering such factors as whether the provision at issue "establish[ed] a

distinctive mechanism" for review or "distinctly limit[ed] the substantive relief available." *Id.* at 644. The Court's decision also suggests that it is appropriate to consider not simply the text of the provision at issue, but what it "fairly implies." *Id.* While the Court concluded that the provision at issue in *Verizon Maryland* "leaves the jurisdictional grant of § 1331 untouched," *id.*, the interpretive inquiry engaged in by the Court is incompatible with the clear-statement rule that petitioner advances here.

Petitioner's reliance on the rule that "repeals by implication are not favored" is likewise misplaced. Pet. Br. 26. That maxim is generally invoked when the Court is asked to find that an *earlier* enacted "specific statute has been repealed by a [later enacted] more general one." *United States v. Continental Tuna Corp.*, 425 U.S. 164, 169 (1976) (citing cases). This case involves the opposite situation where the question is whether the Court should give effect to a *later* enacted specific statute. In that situation (*i.e.*, the one here), the general rule is that the later-enacted, more specific statute trumps the earlier and more general statute. *See, e.g., EC Term of Years Trust v. United States*, 550 U.S. 429, 433 (2007) ("'In a variety of contexts the Court has held that a precisely drawn, detailed statute pre-empts more general remedies.' ... Resisting the force of the better fitted statute requires a good countervailing reason ...." (quoting *Brown v. GSA*, 425 U.S. 820, 834 (1976)); *see also FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000) ("'[A] specific policy embodied in a later federal statute should control our construction of the [earlier] statute, even though it ha[s] not been expressly amended.'") (quoting *United States v. Estate of Romani*, 523 U.S.

517, 530-31 (1998)); *Strawser v. Atkins*, 290 F.3d 720, 733 (4th Cir. 2002) (where a general statute is followed by enactment of a specific one, the specific statute usually operates as an exception to the general rule).[7]

2. Although the only question presented in this case is whether there is federal-question jurisdiction over private TCPA claims, *see* Pet. i, petitioner also argues that the fact that federal courts of appeals have held that there is *diversity* jurisdiction over private

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[7] Because the text of the TCPA and other considerations discussed above clearly evince Congress's intent that private TCPA claims must be brought only in state court—as permitted by state law—the Court may assume, *arguendo*, that private TCPA claims "arise under" federal law for purposes of § 1331. Nevertheless, the private right that Congress created is extraordinary insofar as Congress made the contours and, indeed, availability of the private right dependent on *state law*. *See, e.g.*, *The Chair King, Inc.*, 184 S.W.3d at 717-18 (explaining that Congress chose to allow the States "to determine whether to entertain the private TCPA claims that Congress decided to make exclusively actionable in state court" and holding that Texas had not authorized private claims under the TCPA during the time period at issue); *Bonime*, 547 F.3d at 501 ("Congress has clearly indicated that the courts should treat [the TCPA] as though it were [state law]."). In this regard, the unique private right of action created by the TCPA is analogous to the statutory right at issue in *Shoshone Mining*, which this Court held did *not* arise under federal law (even though it was created by federal law). *See* Pet. Br. 20 ("[T]he statutory right of action at issue in *Shoshone Mining* was an odd one because it provided that state, territory, and local statutory and customary law would in many instances provide the rule of decision."); *see also Shulthis v. McDougal*, 225 U.S. 561, 569-70 (1912) (collecting cases). If this Court concludes that private TCPA claims do not satisfy § 1331's "arising under" requirement to begin with, then federal jurisdiction is unquestionably lacking. *See* Pet. 12 (there is "no basis for jurisdiction other than federal-question jurisdiction").

TCPA claims under 28 U.S.C. § 1332 means that federal-question jurisdiction must exist too. Pet. Br. 34, 47. Not so. As petitioner himself recognizes (at 35), "Congress can and occasionally has prohibited the exercise of federal-question jurisdiction while allowing diversity jurisdiction." And, as courts of appeals have held, recognizing diversity jurisdiction over private TCPA claims is not inherently incompatible with holding that federal-question jurisdiction does *not* exist. *See, e.g.*, *Gottlieb*, 436 F.3d at 338-343.

Given that Congress "sought to put the TCPA on the same footing as state law" in enacting the unique private right of action at issue, it is more natural to assume that Congress intended private TCPA claims to be treated the same as other state law claims for purposes of diversity jurisdiction. *Id.* at 342 ("Insofar as Congress sought, via the TCPA, to enact the functional equivalent of a state law that was beyond the jurisdiction of a state to enact, it would be odd to conclude that Congress intended that statute to be treated differently, for purposes of diversity jurisdiction, from any other state statute.").

In addition, diversity's $75,000 amount-in-controversy requirement (which federal-question jurisdiction lacks) at least partially addresses the concern that federal courts could be inundated with suits for *$500* TCPA claims given the enormous volume of telecommunications presenting potential claims. The costs of federal court litigation (including the costs of securing counsel) are also more proportionate to a claim worth $75,000 or more, so allowing for federal diversity jurisdiction over such claims would not necessarily raise the concerns that led the sponsor of the law to urge States to channel such claims to state

small claims court. *See id.* at 343; *Landsman & Funk PC v. Skinder-Strauss Assocs.*, 640 F.3d 72, 74-90 (3d Cir.), *reh'g en banc granted*, 650 F.3d 311 (3d Cir. 2011).

There are countervailing considerations. For example, Judge Garth has argued that the very considerations that compel the conclusion that federal-question jurisdiction is lacking with respect to private TCPA claims compel the conclusion that diversity jurisdiction is lacking too. *See Landsman & Funk PC*, 640 F.3d at 103-07 (dissenting). That argument also has force. But at a minimum, the availability of diversity jurisdiction for TCPA claims is a closer call for the reasons explained by the majority in *Landsman* and the *Gottlieb* court. And the fact that federal courts have recognized diversity jurisdiction over private TCPA claims provides no basis for this Court to recognize federal-question jurisdiction over such claims—a step that would potentially sweep *all* private TCPA claims into federal court, absence of diversity and amount-in-controversy notwithstanding.

Petitioner complains that the availability of diversity jurisdiction would impermissibly "affect whether a plaintiff has a claim as a matter of substantive law." Pet. Br. 47 (citing *Shady Grove*). That is incorrect. The *availability* of the TCPA private right of action to a prospective plaintiff would not turn on the "accident" of diversity jurisdiction. Assuming § 1332, and not § 1331, is available as a source of federal jurisdiction over private TCPA claims, a plaintiff in State X, which does not "'otherwise permit[]'" such claims, will not have a cause of action in state *or* federal court. *See* Pet. Br. 46; *see also Holster v. Gatco, Inc.*, 618 F.3d 214, 218 (2d Cir. 2010) ("Because [the TCPA] uses state law to define

the federal cause of action, when the state refuses to recognize that cause of action, 'there remains [nothing] to which any grant of federal court jurisdiction could attach.'") (quoting *Bonime*, 547 F.3d at 503 (Calabresi, J., concurring)). But a plaintiff in State Y, which permits such actions, would have the choice of filing in an appropriate state court or—assuming federal diversity jurisdiction is available and its requirements are met—federal court. That is, the cause of action would be "the functional equivalent of a state law." *Gottlieb*, 436 F.3d at 342.

The situation here is distinct from that in *Shady Grove*. *Shady Grove* turned on the application of "*Erie* principles" to the conventional interplay between the federal rules and a State's own rules in the diversity context. The TCPA is unique insofar as it is a federal statute that explicitly gives the States the authority to determine whether to permit private TCPA claims according to their own "laws or rules of court." 47 U.S.C. § 277(b)(3). Giving effect to Congress's express intent to allow private TCPA actions only to the extent "permitted by" state law does not create any "conundrum[]." Pet. Br. 47. Rather, the "conundrum" arises if plaintiffs may circumvent that express limitation—and the laws or rules of court of a State—by simply bypassing state court via § 1331.

3. Finally, petitioner errs in suggesting that recognizing that Congress did not intend for federal-question jurisdiction over private TCPA claims "would impair the federal interests served by the TCPA." Pet. Br. 44 (heading). To begin with, petitioner is wrong to the extent he implies (at 43-44) that respondent does not believe that Congress served an important federal interest by closing, through the TCPA, the interstate-

enforcement loophole that Congress had identified. That objective was unquestionably important—but so too is the *manner* in which Congress chose to address that problem. Instead of directing "The Feds" to take over, Congress elected to provide the States with the interstitial authority necessary to help themselves, as *they* saw fit. Congress authorized private TCPA claims concerning interstate telemarketing practices, but only to the extent that the States themselves wished to permit such claims in their own courts.

If Congress believed that States were not acting responsibly in determining when private TCPA claims should be allowed, it could expand the remedial scheme enacted by the TCPA or take a different approach. But, although the States have taken different approaches with respect to TCPA claims, there is no evidence that any State has acted irresponsibility in determining when and how TCPA claims should be permitted.[8] Petitioner suggests (at 45) that the Court must find that Congress had an "interest in *disabling* federal courts from uniformly interpreting federal law." But Congress could hardly have been more explicit that it wished the scope and availability of the TCPA private right of action to be decided *by the*

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[8] One area in which States have taken divergent approaches concerns whether or to what extent they have allowed class actions. *See Local Baking Prods., Inc. v. Kosher Bagel Munch, Inc.*, 23 A.3d 469, 474-76 (N.J. Super. Ct. App. Div. 2011) (collecting different approaches). This divergence is perfectly consistent with the unique private right of action Congress created—which allows, if not invites, States to experiment in this fashion. *See also Holster*, 618 F.3d at 218 (holding that "[t]he ability to define when a class cause of action lies and when it does not is part of th[e] control" that Congress gave to the States in "solving the problems that the TCPA addresses").

States. It explicitly framed the private right in terms so that it was dependent upon state law, and thus "behaves like" state law. *Bonime*, 547 F.3d at 500.

"Considering the potential burden on state court resources a flood of private TCPA claims might present, it is logical that Congress would choose to allow the states themselves to have some voice in the matter." *The Chair King, Inc.*, 184 S.W.3d at 715; *see id.* at 716 ("There is strong evidence that Congress wanted to assist state regulation in reaching interstate communications if a state so desired, not to create an independent regulatory framework for a potential flood of individual state-court lawsuits."). It is also logical to assume that Congress did not wish to burden the *federal courts* with such claims—especially under the federal-question statute, which has no amount-in-controversy requirement, and thus would open the federal courts to $500 damages claims that Congress believed were most appropriate for *small claims court*.

Petitioner maintains that its position does not "denigrate the important objective served by Congress's authorization for state courts to entertain TCPA actions." Pet. Br. 47. But under petitioner's construction of the TCPA, Congress's painstaking references to state law and state courts added nothing, because it is well-settled that the state courts would have had concurrent jurisdiction over TCPA claims if Congress had said nothing on that matter. So it is difficult to see what "important objective" Congress accomplished by using that language, if it is given the meaningless construction advanced by petitioner.

In the end, petitioner seeks a ruling from this Court that the federal courts are open to entertain private TCPA claims under § 1331—*regardless* of whether, or

in what circumstances, such claims are allowed by state law. *See* Pet. Br. 44-48. Such a regime could scarcely be more removed from the one that Congress expressly intended when it created a private right of action to allow plaintiffs to bring TCPA claims—"*if otherwise permitted by the laws or rules of court of a State*"—"in an appropriate court *of that State.*"

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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REPLY BRIEF

No. 10-1195

IN THE

Supreme Court of the United States

MARCUS D. MIMS,

Petitioner,

v.

ARROW FINANCIAL SERVICES, LLC,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITIONER'S REPLY BRIEF

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ARGUMENT

I. The TCPA's Permissive Grant of State-Court Jurisdiction Does Not Oust Federal Jurisdiction.

A. Respondent Arrow Financial Services does not contest that 28 U.S.C. § 1331 grants federal courts jurisdiction over cases arising under federal law unless Congress has curtailed that jurisdiction. Arrow quibbles over whether this principle is a "clear-statement rule" (Resp. Br. 30), but that is largely beside the point. This Court's precedents may not require Congress to speak with unmistakable clarity to divest federal courts of jurisdiction, but they do require it to *speak*, and they hold that jurisdiction "should not be disturbed by a mere implication flowing from subsequent legislation." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 808 (1976) (quoting *Rosecrans v. United States*, 165 U.S. 257, 262 (1897)). The Court does not read "silence or ambiguous language as modifying or limiting our pre-existing jurisdiction." *Hertz Corp. v. Friend*, 130 S. Ct. 1181, 1187 (2010).

Arrow acknowledges that *Tafflin v. Levitt*, 493 U.S. 455 (1990), and *Yellow Freight Systems, Inc. v. Donnelly*, 494 U.S. 820 (1990), hold that permissive language saying an action "may" be brought in a particular court does not oust other courts of jurisdiction they otherwise presumptively possess, even when, as in *Tafflin*, the reference to the court in which an action "may" be brought appears in the very definition of the right of action. But Arrow argues that their holdings are inapplicable because the judicially created presumption that state courts possess jurisdiction over federal claims is stronger than the presumption

that federal courts possess the jurisdiction granted them in § 1331. Resp. Br. 17. Federal courts are, to be sure, courts of limited jurisdiction. But when an action falls squarely within statutory jurisdictional limits—here, because it arises under federal law—this Court has required the same affirmative action of Congress to displace federal jurisdiction that it has required to oust state-court jurisdiction. *See* Pet. Br. 18-26.

Arrow invokes *Mercantile National Bank v. Langdeau*, 371 U.S. 555 (1963), to argue that in the TCPA, unlike in RICO, the word "may" means "may only." But *Langdeau* concerned a *venue* statute specifying the location in which actions permitted to be filed in state courts might be brought, and concluded that the provision would have meaning only if it limited venue to the locations mentioned. *Langdeau* holds that where a statute not only says actions may be brought in a particular court system but also specifies the venue, the venue provision may be mandatory if it would otherwise be meaningless. By contrast, *Cortez Byrd Chips, Inc. v. Bill Harbert Construction Co.*, 529 U.S. 193 (2000), indicates that absent such circumstances, venue provisions saying an action "may" be filed in a particular venue need *not* be read to displace the more expansive general venue provisions of 28 U.S.C. § 1391. Neither decision suggests, contrary to *Tafflin*, that a statute saying actions may be brought in one court system implicitly excludes *jurisdiction* in another court system not mentioned in the statute.

B. Arrow also argues that the TCPA is different from the statutes in *Tafflin* and *Donnelly* because it does not just say an action "may" be brought in state court, but provides that it "may" be filed in state

court "if" certain conditions are met. "'May,'" says Arrow, "is not the same as 'May, *if*.'" Resp. Br. 13.

Arrow's statement is true as far as it goes, but it does not go very far. The "if" clause certainly limits the permission to file a TCPA action in state court to the condition specified—"if otherwise permitted by the laws or rules of court of a State." But state-court jurisdiction remains permissive: A plaintiff *may* file the action in state court if state laws and rules allow such a claim in that court (and not otherwise). But nothing in the statute says filing a TCPA claim in state court is *mandatory* if state law permits the filing, or otherwise states that a plaintiff may *not* file in federal court. The statute conditionally permits filing in state court, but does not exclude federal jurisdiction—whether or not the condition that permits state-court filing is satisfied.

Indeed, "section 227(b)(3) says *nothing* about the jurisdiction of the federal district courts." *ErieNet, Inc. v. Velocity Net, Inc.*, 156 F.3d 513, 521 (3d Cir. 1998) (Alito, J., dissenting) (emphasis added). It does not make a plaintiff's ability to bring an action *in federal court* dependent on state laws or rules.[1] Indeed, as Judge Posner has pointed out, conditioning the ability to file a TCPA claim in state court on state law and rules of court implies that access to federal court is *not* similarly conditioned. "[O]therwise where

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[1] A contrary reading would raise a host of additional problems. For example, if a plaintiff in state A brought a federal TCPA action (diversity or federal-question) in state B against a corporation headquartered or incorporated in state B based on unlawful calls originating in state C, which state's laws and rules should be consulted to determine whether the action should proceed?

would victims go if a state elected not to entertain these suits?" *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 451 (7th Cir. 2005).

C. Arrow fundamentally misreads the statute to condition the existence and even "contours" of the private right of action on state procedural and substantive law. *See, e.g.*, Resp. Br. 32, n. 7. According to Arrow, "Congress expressly conditioned the private right of action not only on the 'laws' of a State but on the 'rules of court of a State'" and thus "intended state courts to play an indispensable role in shaping the right." *Id.* at 13. But Congress did no such thing. The only thing the statute conditions on state law or rules is the *availability of the action in state court*. The statute "says merely that an action under that provision 'may' be brought in an appropriate state court 'if otherwise permitted by the laws or rules of court of' that state." *ErieNet*, 156 F.3d at 521 (Alito, J., dissenting).

Thus, recognizing federal jurisdiction over TCPA claims will not assign federal courts the unaccustomed role of "applying state 'rules of court.'" Resp. Br. 13. Nor will it require federal courts to apply "substantive state limits on TCPA claims," *id.* at 13-14, or place them in the position of "substantively alter[ing] the contours of TCPA claims." *Id.* at 13. Rather, a federal court entertaining a TCPA claim under a preexisting grant of subject-matter jurisdiction (whether federal-question or diversity) will "apply federal substantive and procedural law." *Gottlieb v. Carnival Corp.*, 436 F.3d 335, 342 n.8 (2d Cir. 2006).

Arrow's contrary view—that the language permitting actions in state court if allowed by state law makes state procedural law applicable *in federal*

courts—reflects a "highly implausible reading of the Act." *Holster v. Gatco, Inc.*, 130 S. Ct. 1575, 1576 (2010) (Scalia, J., concurring). Arrow's argument that the TCPA makes state *substantive* law controlling is more implausible still because it disregards the law's plain language, which makes liability dependent on whether the defendant has committed "a violation of this subsection or the regulations prescribed under this subsection." 47 U.S.C. § 227(b)(3)(A). The statute explicitly designates *federal* law as the substantive rule of decision in TCPA cases wherever they are filed. *See, e.g., First Nat'l Collection Bur. v. Walker*, 348 S.W.3d 329 (Tex. App. 2011) (holding that the TCPA preempts conflicting state standards).

The TCPA is therefore far from "analogous to the statutory right at issue in *Shoshone Mining* [*Co. v. Rutter*, 177 U.S. 505 (1900)]." Resp. Br. 32, n.7. In *Shoshone Mining*, the statute designated state and local laws as the rules of decision in many cases, and the Court held that cases not actually governed by federal law did not arise under federal law for jurisdictional purposes. *See id.* But *every* case under the TCPA raises a federal-law issue because liability depends on a violation of exclusively federal-law requirements.

The statutory language is thus wholly inadequate to the task Arrow assigns it: creating a unique federal right of action that "behaves like state law." Arrow Br. 11 (quoting *Bonime v. Avaya, Inc.*, 547 F.3d 497, 501 (2d Cir. 2008)). Nothing in the statute's permissive authorization of state-court litigation provides the affirmative indication of legislative intent necessary to divest federal courts of their presumptive jurisdiction over any action otherwise within the scope

of their general jurisdictional grants. *See Verizon Md., Inc. v. Pub. Serv. Comm'n*, 535 U.S. 635, 62 (2002); *see also Colorado River*, 424 U.S. at 808-809 & n.15 (statute granting state courts jurisdiction over federal water-rights cases does not preclude federal-question jurisdiction under 28 U.S.C. §§ 1346 & 1331). Still less does the statutory language support the elaborate edifice Arrow constructs, under which state law defines the "contours" of a federal right of action and strips it of its federal-law character.

II. The TCPA's Language Is Not Superfluous.

Arrow contends that unless the statutory language is given the unusual construction it advocates, the language is meaningless because, under *Tafflin*, TCPA claims could be brought in state courts even without it. Arrow brushes aside Judge Posner's explanation that the language has the benefit of making clear that federal jurisdiction is not exclusive. Despite the venerable rule of *Claflin v. Houseman*, 93 U.S. 130 (1876), that issue has generated lengthy disagreements among the lower courts over other statutes—such as the one that required this Court to decide *Tafflin* a year before the TCPA was enacted. *See Brill*, 427 F.3d at 451. To avoid such misunderstanding, Congress often enacts statutory language that may not be strictly necessary in order to "make assurance doubly sure." *Crandon v. United States*, 494 U.S. 152, 174 (1990) (Scalia, J., concurring); *see also Exxon Mobil Corp. v. Allapattah Servs., Inc*, 545 U.S. 546, 565 (2005); *Am. Trucking Ass'ns v. Atchison, Topeka, & Santa Fe Ry.*, 387 U.S. 397, 412 (1967); *United States v. Alpers*, 338 U.S. 680, 684 (1950).

Arrow objects that there is no evidence Congress was "worried" about the possibility of exclusive feder-

al jurisdiction over private TCPA actions. Resp. Br. 15. But evidence that Congress "worried" about something is not necessary to demonstrate that statutory language clarifying the point is meaningful. And as Arrow itself observes, the legislative history *does* indicate that Congress wanted to emphasize that the private right of action, unlike state attorney-general actions, *could* be brought in state court. *See* Resp. Br. 22-23. *Tafflin*, of which Congress was presumptively aware, *see* Resp. Br. 14, left open the possibility that an "unmistakable inference from legislative history" or "a clear incompatibility between state-court jurisdiction and federal interests" could exclude state-court jurisdiction even absent statutory language dictating that result. *See* 493 U.S. at 461. What better way to avoid any such misreading of congressional intent than to provide explicitly that an action may be brought in state court?

Arrow similarly disparages the second function of the "may, *if*" language: defining when state courts must entertain the TCPA right of action, and substituting a statutory standard ("if otherwise permitted by the laws or rules of court of a State") for the judge-made standard of *Testa v. Katt*, 330 U.S. 386 (1947). Arrow's only responses are that "petitioner ... refuses to say how, or even if, Congress actually altered *Testa*'s rule," and that "there is no evidence that Congress had this particular concern in mind." Resp. Br. 15.

This case, where the issue is not presented, is not the occasion for deciding to what degree the statutory standard produces different results than would *Testa*—an issue that has divided state supreme courts. *See* Pet. Br. 46 & n.9. But if Arrow means to suggest

that the statute leaves *Testa* unaltered, it contradicts itself later when it says that the TCPA "explicitly gives the States the authority to determine whether to permit private TCPA claims according to their own 'laws or rules of court,'" Resp. Br. 35—a reading that upends *Testa*'s nondiscrimination standard.

Here, the critical point is not exactly *what* the statutory "if otherwise permitted" standard means, but that it quite evidently means *something*. Even Arrow acknowledges that the standard defines when plaintiffs are entitled to bring TCPA claims in state courts. Thus, in cases testing whether a TCPA claim may be brought in state court, the decisive issue is what the statutory language means, not what *Testa* means. In substituting a statutory standard for *Testa*'s judge-made rule, the language is not "superfluous" regardless of whether the results it yields are no different from, little different from, or diametrically opposite to the results *Testa* would yield absent the "*if*" clause.[2]

As for "evidence that Congress had this particular concern in mind," no more evidence is necessary than the language of the statute. On its face, it addresses and provides a standard for resolving the *Testa* question. No legislative history documenting Congress's "concerns" is needed to prove that a statute does what its language says.

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[2] For examples of the possible different consequences of the TCPA language, *see* Pet. Br. 38 & n.8.

III. Context, Legislative History, Administrative Construction, and Congressional Ratification Do Not Support Arrow.

A. Turning from the unsupportive text of § 227(b)(3), Arrow argues that statutory "context" indicates that state-court jurisdiction under § 227(b)(3) is exclusive because the TCPA provides exclusive *federal* jurisdiction over state attorney general actions in § 227(f), and this "juxtaposition ... makes clear that Congress had different jurisdictional regimes in mind." Resp. Br. 20. Congress certainly had "different jurisdictional regimes" in mind. The question is *what the difference is*, and the answer does not help Arrow: Section 227(f) provides for jurisdictional exclusivity, and § 227(b)(3) does not.

Arrow argues that Congress's failure to enact special venue and service-of-process rules for private TCPA actions in federal court, as it did for state attorney-general actions, implies Congress intended to prohibit TCPA claims in federal court. Resp. Br. 21. But the absence of special provisions only means "there was no need for Congress to reiterate" the standard venue and service-of-process rules applicable to individual actions brought under the jurisdictional grants of 28 U.S.C. §§ 1331 and 1332. *See ErieNet*, 156 F.3d at 523 (Alito, J., dissenting). Moreover, *Tafflin* concluded that RICO's special venue and service provisions, applicable only in federal court, did not indicate intent to foreclose state-court jurisdiction, *see* 493 U.S. at 466; conversely, the *absence* of such features does not reveal intent to make state-court jurisdiction exclusive. Similarly, no provisions regarding conflicts between enforcement proceedings brought by different governmental entities are needed for pri-

vate actions, whether in federal or state court, so the absence of such provisions does not, as Arrow contends, suggest anything about jurisdiction. *See id.*

In another appeal to "context," Arrow says Congress must have meant to exclude federal jurisdiction over TCPA claims because, in other provisions in Title 47 of the United States Code, Congress explicitly authorized concurrent state and federal jurisdiction. But "because these provisions of the Communications Act were not passed contemporaneously with the TCPA, they shed little light on the intent of Congress at the time of the TCPA's passage." *ErieNet*, 156 F.3d at 523 (Alito, J., dissenting).

Moreover, the provisions Arrow cites apparently provide for both state and federal jurisdiction to distinguish them from other Communications Act provisions providing *exclusive federal-court* jurisdiction, *e.g.*, 47 U.S.C. §§ 252(e)(4) & (6); *id.* § 402, not to differentiate them from provisions allowing exclusive state-court jurisdiction (of which Arrow cites none). And there are many *other* Communications Act provisions that say only that actions may be brought in federal court but do not, under *Tafflin*, preclude concurrent state-court jurisdiction. *See, e.g.*, 47 U.S.C. §§ 207, 274(e), 338(i)(7), 401(b), 532(d), 551(f)(1). Accordingly, this Court has already concluded that the Communications Act's approach to jurisdiction is the opposite of the one Arrow posits: "where otherwise applicable jurisdiction was meant to be excluded, *it was excluded expressly*." *Verizon Md.*, 535 U.S. at 644 (emphasis added). The "context" Arrow invokes refutes its argument.

B. Because statutory language and structure do not support it, Arrow turns to legislative history. The

history on which it places primary reliance, a floor statement in which one Senator repeats what the statute says—that private claims may be brought in state court while state attorney-general actions must be brought in federal court—sheds no light on the question here. Resp. Br. 22-23. If the statutory language does not divest the federal courts of jurisdiction, a floor statement paraphrasing it surely does not.

Arrow also concocts an argument that the legislative history indicates Congress must have been concerned about an overwhelming influx of small-dollar claims if it allowed federal jurisdiction over the TCPA right of action, and therefore must have intended to bar such jurisdiction. Arrow's sole support is that the legislative history indicates Congress's awareness that there are billions of telemarketing calls each year, from which Arrow concludes that "millions" of TCPA claims could result. Resp. Br. 23-24.

The idea that billions of *calls* translate into millions of *violations* and, in turn, millions of *lawsuits* is farfetched (assuming, among other things, a shocking degree of noncompliance). There is no evidence that TCPA claims number in the millions. The *total* number of civil suits filed in state courts annually is about 20 million; the majority are contract actions (mostly collection cases), with small-claims, probate, real property, mental health, and tort cases making up most of the rest.[3] There is no reason to think TCPA cases make up more than an infinitesimal percentage

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[3] National Center for State Courts, Court Statistics Project, Civil Caseloads (2008), http://www.ncsconline.org/d_research/csp/2008_files/Civil.pdf.

or that they would swamp federal courts if allowed to be filed there. The federal courts receive about 300,000 new civil cases each year.[4] According to one source, from January 1 through September 15 of this year, fewer than 300 TCPA cases were filed in district courts nationwide, fewer than any other category of consumer cases reported.[5] And no one has presented evidence that courts in the Seventh Circuit, where federal TCPA filings have been permitted for six years, have been snowed under by TCPA claims.

Moreover, Arrow cites no evidence in the legislative history that Congress was concerned about overwhelming federal TCPA caseloads. A legislative history argument without legislative history to support it is the weakest of reeds. To paraphrase Judge Leventhal, it is like looking over a crowd and picking out *imaginary* friends. *Cf.* Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term,* 68 Iowa L.Rev. 195, 214 (1983).

There is nothing unusual about Congress providing federal-court actions for small recoveries in consumer protection statutes: The Consumer Credit Protection Act, for example, allows small-dollar individual claims for a variety of common violations. *See, e.g.*, 15 U.S.C. § 1640(a). What is *unusual* is for Congress to exclude small-dollar federal claims from federal court. Here, Congress quite notably did *not* do what it

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[4] http://www.uscourts.gov/uscourts/Statistics/FederalJudicialCaseloadStatistics/2010/tables/C00Mar10.pdf.

[5] WebRecon LLC, FDCPA and Other Consumer Lawsuit Statistics, September 1-15, 2011, https://www.webrecon.com/b/fdcpa-case-statistics/fdcpa-and-other-consumer-lawsuit-statistics-september-1-15-2011/.

has done in a handful of other instances: limit federal jurisdiction to cases exceeding a statutorily specified damages threshold. Congress has provided that Carmack Amendment claims (involving loss or damage to property shipped in interstate commerce) may be brought in federal court only if the amount in controversy exceeds $10,000, 28 U.S.C. § 1337(a); that Consumer Product Safety Act claims are only cognizable if damages exceed $10,000, 15 U.S.C. § 2072(a); and that Magnuson-Moss Warranty Act claims may not be brought in federal court if the aggregate amount in controversy is less than $50,000 (or the value of any individual claim is less than $25), 15 U.S.C. § 2310(d)(3). That Congress elsewhere *explicitly* foreclosed small-dollar claims to avoid burdening the federal courts makes it highly unlikely that it would have here taken the very unusual step of *implicitly* foreclosing federal jurisdiction over a federal claim altogether (regardless of amount in controversy) based on *unstated* concerns about the burden of small claims.

C. Arrow also points to legislative history to argue that the TCPA was intended to provide only "interstitial" federal regulation of telemarketing. Arrow relies on one of the legislative findings supporting the TCPA—that federal legislation was needed in part because "telemarketers can evade [state] prohibitions through interstate operations." Resp. Br. 4 (quoting TCPA § 2(7), 47 U.S.C. § 227 note). Arrow leaps to the conclusion that the TCPA reflects a dominant state interest in regulating telemarketing, which in its view supports limiting the TCPA's private right of action to state courts.

In fact, although one reason for Congress's action was the perceived inefficacy of state regulation, Con-

gress also asserted its own interest in protecting both consumers and legitimate telemarketers. *See* Pet. Br. 4-5. As the House Report on the legislation stated, "[t]he preponderance of the evidence documents the existence of a national problem and argues persuasively in favor of federal intervention balancing the privacy rights of the individual and the commercial speech rights of the telemarketer." H.R. Rep. No. 102-317, at 10 (1991).

Congress's solution to this national problem was national in character and scope. Congress found that "*Federal* law is needed." TCPA § 2(7) (emphasis added). It enacted detailed substantive standards binding on telemarketers nationwide. It delegated substantial regulatory authority to a federal agency to flesh out those standards. Congress permitted state enforcement actions, but only in federal courts, and it subordinated those actions to federally initiated ones. In short, Congress established a comprehensive federal regulatory scheme in which state authorities and laws play a distinctly secondary role. Far from merely supplementing state efforts, Congress aimed "both [to] *relieve states of a portion of their regulatory burden* and [to] protect legitimate telemarketers from having to meet multiple legal standards." H.R. Rep. No. 102-317, at 10 (emphasis added). The TCPA's creation of a preponderantly federal regulatory and enforcement scheme refutes the suggestion that the private right of action must be limited to state courts, and subordinated to state law, to reflect the statute's interstitial character.

In other words, as is typical in Commerce Clause legislation, while the *problem* Congress addressed was, in part, evasion of state regulatory efforts, the

solution it adopted was a uniform, national statutory and regulatory scheme. The FCC, though silent on the jurisdictional issue, has emphasized the primacy of federal law under the TCPA: "[F]ederal statutes like the TCPA are generally intended to have uniform nationwide application and there is a danger that the federal program would be impaired if state law were to control interpretation of a federal law." Brief for the FCC and U.S. as Amici Curiae at 13-14, *Charvat v. Echostar Satellite, LLC*, No. 09-4525 (filed Nov. 15, 2010) (internal quotation marks omitted).

D. Arrow suggests that this Court defer to a purported FCC construction of the TCPA rejecting federal jurisdiction over private actions. Arrow cites no authority holding that courts must or may defer to a federal agency's construction of statutory provisions defining jurisdiction over a private right of action. Deference to an agency's construction of statutory provisions *it administers* rests on explicit or implicit congressional delegation of authority to "speak with the force of law" to resolve ambiguities in the statutory framework. *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001). The TCPA nowhere delegates authority to the FCC, or any agency, concerning jurisdiction over private claims. *Courts* are "the adjudicator[s] of private rights of action arising under the statute." *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990). The "precondition to deference under *Chevron*"—that is, "a congressional delegation of administrative authority"—is absent. *Id.*

In any event, there is nothing to defer to. Arrow points to no agency actions or statements that take a position on whether a plaintiff may bring a TCPA action in federal court under § 1331. Arrow cites only

informational materials that say what the statute says—an action may be brought in a state court. *See* Resp. Br. 25-26. The agency has not, however, taken a position—let alone spoken with the force of law—on whether the statute precludes an action in federal court. As Arrow observes, even in this Court the FCC has said nothing. The Court cannot defer to Delphic silence.

E. Arrow argues that Congress "ratified the prevailing ... view of the courts of appeals" when it "enacted numerous amendments to the TCPA from 1992-2010" without altering the private right of action. Resp. Br. 26. This Court, however, has emphasized that "ratification" by acquiescence should be found only where there is "*overwhelming evidence*" that later Congresses focused on the "*precise* issue," *Rapanos v. United States*, 547 U.S. 715, 750 (2006) (plurality opinion), or where Congress "*reenacts* statutory language that has been given a consistent judicial construction." *See, e.g., Central Bank of Denver, NA v. First Interstate Bank of Denver, NA*, 511 U.S. 164, 185 (1994) (emphasis added). Otherwise, it is "impossible to assert with any degree of assurance that congressional failure to act represents affirmative congressional approval of the courts' statutory interpretation." *Id.* at 186 (citations, internal quotation marks, and brackets omitted); *see also Tafflin*, 493 U.S. at 462-63 (declining to infer preclusion of jurisdiction from legislative inaction).

Arrow cites legislation from 1992 and 1994 that made one change to the FCC's regulatory authority to exempt certain calls from TCPA prohibition and corrected two typographical errors. Pub. L. No. 102-556 (1992); Pub. L. No. 103-414 (1994). Both *predate* the

earliest appellate decisions concerning federal jurisdiction under the TCPA and could not have "ratified" them absent congressional clairvoyance. Arrow also invokes Public Law No. 108-187 (2003), which amended one sentence in the TCPA to encompass calls originating outside the United States, and Public Law No. 109-21 (2005), which provided an "established business relationship" exception to the junk-fax prohibition. Neither law amended or reenacted the private right of action or involved any focus on the jurisdictional issue. The final statute, Public Law No. 111-331 (2010), was enacted long after the Seventh Circuit's *Brill* decision created a circuit-split over jurisdiction and could not have ratified any judicial consensus. Moreover, that law added new caller-ID regulations that are not subject to an express private right of action, and it thus reflects *no* intent concerning jurisdiction over such a right of action.

IV. Arrow's Reading of the Statute Is Incoherent.

Arrow cannot decide whether its argument is that the language providing that actions "may" be brought in state court really means they may "only" be brought in state court, which would exclude bringing them in diversity cases or under the supplemental jurisdiction provided by 28 U.S.C. § 1367, or whether it only excludes federal-question jurisdiction. *See* Resp. Br. 32-35. Arrow cannot decide because both choices are unpalatable. Excluding diversity and supplemental jurisdiction would contradict its theory that the TCPA right of action "behaves" like one under state law and would have other strange consequences, such as requiring plaintiffs with claims under other federal statutes to divide their causes of action or for-

go otherwise available federal jurisdiction. But allowing diversity and supplemental jurisdiction runs up against the problem that nothing in the statute's language creating permissive state-court jurisdiction supports any distinction between different types of *federal* jurisdiction that are or are not permitted—not surprisingly, because the language does not address federal jurisdiction at all. The dilemma illustrates the perils of displacing jurisdiction by implication, which permits no definitive answers as to how *much* jurisdiction is ousted.

Perhaps because its jurisdictional argument is unsatisfactory, Arrow falls back on what it calls an alternative argument that a limitation to state courts is inherent in the right of action itself. Resp. Br. 27-29. Arrow's argument, not presented below and therefore waived, confuses the concepts of jurisdiction and rights of action. A right of action specifies that A is liable to B in X amount in Y circumstances. *Key Tronic Corp. v. United States*, 511 U.S. 809, 818 n.11 (1994). Jurisdiction determines which court can hear such a claim: "Subject-matter jurisdiction properly comprehended ... refers to a tribunal's 'power to hear a case ....'" *Union Pac. R.R. v. Bhd. of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment*, 130 S. Ct. 584, 596 (2009) (citation omitted). A right of action exists, or not, and a court has jurisdiction over it, or not; but a limit on which court may hear the claim is a limit on jurisdiction, not a part of the right of action itself.

If Arrow were correct, this Court should have said in *Tafflin*—where the very phrase creating the right of action says that an action may be brought in federal court—that the right of action did not "exist" in

state court, regardless of jurisdiction. The Court did not do so because where an action may be brought is a question of jurisdiction, not of the scope of the right of action. If the permission to bring a TCPA action in state court does not oust federal jurisdiction, it does not otherwise bar the claim in federal court.

V. Federal Jurisdiction Does Not Undermine the Role of State Small-Claims Courts.

A. Federal jurisdiction over TCPA claims is entirely consistent with Congress's expectation that state small-claims courts would be available forums for many TCPA cases. That plaintiffs have the option of a federal forum does not mean they will forgo state small-claims procedures in cases, unlike this one, in which their TCPA claims fall within the jurisdictional limits of small-claims courts. Cases involving small numbers of unintentional violations (the cases most likely to fall within small-claims jurisdictional limits, which in 31 states are $6,000 or less[6]) are unlikely to be filed in federal court if for no other reason than that the filing fee prescribed by 28 U.S.C. § 1914(a) would be disproportionate to the possible recovery. Arrow's fear that "federal courts could be inundated with suits for *$500* TCPA claims," Resp. Br. 33, is unrealistic. To paraphrase Judge Posner, only a lunatic or a fanatic will risk a $350 federal filing fee for a chance to win $500. *Cf. Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004).

Filing fees aside, plaintiffs are unlikely to overlook the features of small-claims courts that make them

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[6] HALT, 2011 Small Claims Report Card, http://www.halt.org/reform_projects/small_claims/2011_small_claims_rc/.

attractive venues for the pursuit of recoveries that are not large enough to make suing in federal district courts or state trial courts of general jurisdiction worth the time and expense. And plaintiffs' attorneys are equally unlikely to bring individual TCPA claims for trivial amounts in courts where such claims cannot be litigated cost-effectively. Because the TCPA contains no fee-shifting provision, attorneys for TCPA plaintiffs will typically be compensated on a contingency basis and will avoid filing cases whose potential recoveries cannot compensate them for the time and resources that would be needed to litigate them in federal court. *See* Herbert M. Kritzer, *Contingency Fee Lawyers as Gatekeepers in the Civil Justice System*, 81 Judicature 22 (1997).

B. Nor is it likely that defendants will routinely remove TCPA cases involving trifling claims to federal court and thus deprive TCPA plaintiffs of a small-claims forum in such cases. See Resp. Br. 23. True, if TCPA claims fall within the original jurisdiction provided by § 1331, they can also be removed. *See* 28 U.S.C. § 1441(b). But a defendant would have to be as much of a lunatic to retain counsel and pay the $350 filing fee to remove a $500 case from small-claims court as a plaintiff would have to be to bring the case in federal court in the first place. *See* 28 U.S.C. § 1914(a) (imposing filing fee on one who institutes an action in federal court "by ... removal"). If it took an attorney only one hour to prepare and file removal papers, the filing and attorney fees together would exceed the amount of a minimal TCPA claim. *See* Nat'l Fed'n Indep. Bus. Br. 9 (positing "a modest hourly rate of $200 per hour to retain outside counsel").

Moreover, as all three of the amicus curiae briefs supporting Arrow explain at length, the benefits of streamlined and inexpensive procedures are highly prized by defendants as well as plaintiffs in cases involving only individual claims for the small amounts within the jurisdictional limits of small-claims courts. As one of those briefs explains:

> Like consumers, defendants facing TCPA claims ... have an interest in having a forum in which they can resolve such claims as quickly, efficiently and inexpensively as possible. State courts—especially small claims courts—provide that forum, and they are more widely accessible to consumers and defendants alike than federal courts.

DBA Int'l Br. 4-5; *see also* Nat'l Fed'n Indep. Bus. Br. 5-9; ACA Int'l Br. 7-10.

C. The incentives of both plaintiffs and defendants thus suggest that TCPA claims genuinely appropriate for resolution by small-claims courts will be litigated there rather than being filed in or removed to the federal courts—regardless of whether jurisdiction under § 1331 is theoretically available. But not all TCPA claims meet that criterion. Many claims, such as Mr. Mims's, involving allegations of multiple intentional violations of the statute (at up to $1,500 per violation), far exceed the jurisdictional limits of small-claims courts, which in Florida are only $5,000. Fla. Sm. Cl. R. 7.010. The suggestion of one amicus curiae that Mr. Mims "should have filed his TCPA claims" in "Florida small-claims court," Nat'l Fed'n Indep. Bus. Br. 6, disregards that he *could not* have done so.

In addition, § 227(b)(3) expressly provides a right to *enjoin* TCPA violations. 47 U.S.C. § 227(b)(3)(A). Such injunctive relief is unavailable in the "vast ma-

jority" of state small claims courts.[7] Mr. Mims could not have brought his claim for injunctive relief (*see* JA 19) in a Florida small-claims proceeding even if his monetary claims were within the jurisdictional limits. *See Tax Certificate Redemption's, Inc. v. Meitz*, 705 So. 2d 64, 65 (Fla. Dist. Ct. App. 1997) (Florida small-claims procedures do not apply to equitable claims).

For TCPA claims that are outside small-claims jurisdiction because of the damages claimed, relief sought, or both, the question is whether the claims will be litigated exclusively in state trial courts of general jurisdiction or whether they may also be brought in federal court. The benefits of inapplicable small-claims procedures are irrelevant to that question. Such TCPA cases are comparable in terms of amount in controversy, relief requested, and nature of issues to many statutory claims that federal courts routinely hear under their federal-question jurisdiction. Either plaintiffs or defendants, or both, may have reasons to prefer a federal forum in particular TCPA cases—including case backlogs in underfunded and overburdened state courts, the greater familiarity of federal courts with federal statutory issues, the benefits of the Federal Rules of Civil Procedure, and the quality of the federal judiciary. The choice of a federal forum that is generally available in federal-question cases should not be denied the parties in *all* TCPA cases merely because state small-claims courts are the better forum for *some* TCPA cases.

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[7] HALT, Small Claims Court Best Practices 4, http://www.halt.org/reform_projects/small_claims/2011_small_claims_rc/pdf/Small_Claims_Best_Practices.pdf.

Limiting TCPA claims to state courts, and state small-claims courts at that, would likely significantly limit the efficacy of the right of action in enforcing the statute's prohibitions. Arrow's amicus curiae ACA International makes no bones about this objective: It asserts that its members regularly use automated dialers to call cell phones in violation of the statute, and complains that if federal jurisdiction is available (and with it, potentially, class actions under applicable federal rules) this unlawful practice may be inhibited. ACA Int'l Br. 3, 12-13. The jurisdictional preferences of serial TCPA violators are no reason for reading into the statute a limitation not found in its text.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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November 2011

AMICUS CURIAE BRIEF

No. 10-1195

IN THE

Supreme Court of the United States

MARCUS D. MIMS,
Petitioner,

v.

ARROW FINANCIAL SERVICES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR ACA INTERNATIONAL AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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IN THE

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10-1195

MARCUS D. MIMS,
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On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR ACA INTERNATIONAL AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

Founded in 1939, ACA International ("ACA") is a not-for-profit trade association of businesses and professionals that assist creditors in managing and collecting accounts receivables.[1] ACA members include approximately 3,000 third-party collection agencies, 650 credit grantors, 225 asset buyers, 200

[1] No counsel for a party authored any part of this brief – the filing of which has been consented to by all parties – and no person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of the brief.

vendor affiliates, and 850 attorneys. Collectively, ACA members employ nearly 150,000 collector-employees. ACA members range from small businesses that operate within a single state to multinational companies that operate domestically and abroad. About half the collection agencies that are members of ACA have fewer than ten employees. Many ACA members are wholly or partly owned or operated by minorities or women. ACA serves as the voice of its members before legislatures and regulatory authorities. It also provides a variety of services that help its members comply with the laws that regulate debt collection.

ACA members assist businesses of all sizes in collecting payment for goods and services that they provide to their customers. In 2005, the collections industry recovered $39.3 billion in debt for businesses, and these recoveries saved the average American household $351 that would have otherwise been spent had businesses been forced to raise prices due to bad debt. *See* National Economic Consulting Group, PricewaterhouseCoopers LLP, *Value of Third-Party Debt Collection to the U.S. Economy: Survey and Analysis* (June 27, 2006) (available at http://wacollectors.org/MiscFiles/Press%20Room/price%20cooper%20waterhouse%20study.pdf) (last visited on October 24, 2011).

To collect debts efficiently, ACA members call consumers using predictive dialers,[1] which, according

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[1] A predictive dialer has the capacity to dial specified telephone numbers from a database or list and time the calls so that a live representative is likely to be available when a call is answered. *See In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*,

to the Federal Communications Commission ("FCC"), fall within the definition of "automatic telephone dialing system" under the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227(a)(1). The TCPA prohibits using automatic telephone dialing systems to make calls to numbers that are assigned to wireless telephones without the prior express consent of the called party. § 227(b)(1)(A)(iii).

As the popularity of mobile phones has risen in recent years, consumers have filed hundreds of TCPA actions against debt collectors in federal court, typically alleging that the debt collector violated the TCPA by using a predictive dialer to call the consumer on a mobile phone. The increasing number of private TCPA actions filed in federal courts threatens to render the collections process ineffective, which in turn would threaten the viability of the businesses that ACA members serve and raise the prices that consumers pay. Because many ACA members are defendants in private TCPA litigation, they have a keen interest in urging the Court to hold that such litigation should be resolved in state courts, which can dispose of the litigation more efficiently than federal courts, and which are the forums that Congress selected when it enacted the statute.

ACA has participated as *amicus curiae* in other cases before the Court involving issues of interest to its members. *See First American Financial Corp. v. Edwards*, No. 10-708 (2011); *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. ---, 130 S. Ct. 1605 (2010).

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18 FCC Rcd. 14014, 14090-91 ¶¶ 130-31 (July 3, 2003) (2003 WL 21517853).

SUMMARY OF ARGUMENT

This Court should affirm the Eleventh Circuit's conclusion that Congress removed private TCPA actions from the grant of federal-question jurisdiction in 28 U.S.C. § 1331 for the ample reasons developed in Respondent's brief. ACA submits this *amicus* brief in order to bring to the Court's attention the significant efficiencies that would be achieved if, consistent with Congress's intent, private claims under the TCPA were adjudicated in state small claims courts, instead of federal courts.

In small claims courts, TCPA actions can be resolved in as little as a few weeks. The streamlined procedures of small claims courts spare litigants the cost of retaining counsel, conducting discovery, and filing dispositive motions. In federal courts, by contrast, TCPA claims often are not resolved until after years of costly litigation because the Federal Rules of Civil of Procedure allow for broad discovery, the possibility of class certification, and the presentation of dispositive motions before trial.

In the TCPA, Congress made clear its intent to avoid "opening federal courts to the millions of potential private TCPA claims" by assigning jurisdiction over these actions to the state courts. *Int'l Science & Tech. Inst., Inc. v. Inacom Comm., Inc.*, 106 F.3d 1146, 1157 (4th Cir. 1997). The TCPA's authorization of state-court jurisdiction over private TCPA claims was intended to prevent the rising number of private TCPA actions that are now being filed in federal courts. The Eleventh Circuit's decision should be affirmed because it is consistent with Congress's intent and it would reduce the costs associated with private litigation under the TCPA.

ARGUMENT

Under the federal-question statute, the district courts have jurisdiction "of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. "A suit arises under the law that creates the cause of action," and thus a cause of action that is created by a federal statute generally will come within federal-question jurisdiction. *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804, 808 (1986) (quoting *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916)). A cause of action created by a federal statute, however, may not be brought in the district courts when the statute that creates the cause of action assigns exclusive jurisdiction to another court. *See, e.g.*, 28 U.S.C. § 1491 (Court of Federal Claims has exclusive jurisdiction over takings claims in excess of $10,000); 19 U.S.C. § 1581 (Court of International Trade has exclusive jurisdiction over suits under § 516 of the Tariff Act of 1930); *c.f. Shoshone Mining Co. v. Rutter*, 177 U.S. 505, 509 (1900) (suits authorized by federal law to determine mining claims did not arise under federal law for purposes of 28 U.S.C. § 1331 because they did not involve "any question as to the construction or effect of the Constitution or laws of the United States").

Congress excluded private actions under the TCPA from § 1331's grant of federal-question jurisdiction by assigning exclusive jurisdiction over those actions to the state courts.[3] *See, e.g., Int'l Science*, 106 F.3d at

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[3] Under the TCPA, a person "may, if otherwise permitted *by the laws or rules of court of a State, bring in any appropriate court of that State*," an action for statutory and actual damages for each violation of 47 U.S.C. § 227(b). 47 U.S.C. § 227(b)(3)(B) (emphasis added).

1157; *Foxhall Realty Law Offices, Inc. v. Telecomms. Premium Servs., Ltd.*, 156 F.3d 432, 435 (2d Cir. 1998). In particular, Congress envisioned that plaintiffs would bring TCPA claims in the small claims courts established by the states. The bill's sponsor, Senator Ernest Hollings, stated:

> it is my hope that States will make it as easy as possible for consumers to bring such actions, preferably in small claims court....
>
> Small claims court or a similar court would allow the consumer to appear before the court without an attorney. The amount of damages in this legislation is set to be fair to both the consumer and the telemarketer. However, it would defeat the purposes of the bill if the attorneys' costs to consumers of bringing an action were greater than the potential damages. I thus expect that the States will act reasonably in permitting their citizens to go to court to enforce this bill.

137 Cong. Rec. S16205-06 (daily ed. Nov. 7, 1991).

As explained below, Congress's decision to grant the state courts exclusive jurisdiction over private TCPA actions was a wise one because the streamlined procedures available in small claims courts allow for faster and less costly resolution of TCPA claims than the Federal Rules of Civil Procedure. The proliferation of private TCPA actions in the federal courts is contrary to Congress's intent as expressed in the statute's text and legislative history.

I. Small Claims Courts Offer Parties in Private TCPA Litigation Significant Efficiencies over the Federal District Courts.

Private actions under the TCPA present a straightforward set of issues. A violation of § 227(b)(1)(A)(iii) occurs if a defendant uses an autodialer to call the plaintiff at a number assigned to a wireless phone and the plaintiff has not consented to receive the call. 47 U.S.C. § 227(b)(1)(A)(iii). Small claims courts can resolve these simple claims more efficiently than the federal district courts because they are governed by streamlined procedural rules.

In many states, the rules applicable to small claims require that cases be called for trial less than four months after the plaintiff files suit. *See, e.g.*, Ca. Code Civ. Pro. § 116.330 (the clerk must set the hearing 20 to 70 days after the plaintiff files the claim); Fla. Sm. Cl. R. 7.090(b), (d) (the court must conduct the trial within 110 days after the plaintiff files the claim); Ill. Sup. Ct. R. 283, 286(a) (the court must try the case on the day set for appearance in the summons, which is to be no more than 40 days after issuance); Revised Code of Washington ("RCW") § 12.40.030 (the trial is to be held on the first appearance date unless dispute resolution services are offered or local rules provide for a different date). Getting a case ready for trial in the United States district courts takes significantly more time. For cases that the district courts disposed of at trial in 2010, the median interval from the filing of the case to its disposition was 23.0 months.[4]

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[4] *See* Statistical Tables for the Federal Judiciary compiled by the Administrative Office of the United States Courts, Table C-

The rules governing small claims courts often provide that the parties may not take discovery or file non-dispositive motions except upon leave of court. *See, e.g.*, Ca. Code Civ. Pro. § 116.310(b) (exempting small claims from certain discovery procedures); Fla. Sm. Cl. R. 7.090(c) (obviating pretrial motions); Ill. Sup. Ct. R. 287(a)-(b) (barring discovery and non-dispositive motions); Mass. Trial Ct. R., Rule III: Unif. Sm. Cl. R. 5 (barring discovery except upon cause shown); NYCCCA § 1804 (barring discovery without leave of court); Tex. Gov. Code § 28.033(e) (limiting discovery to what is considered reasonable by the presiding judge). Defendants in small claims courts are not required to file an answer to the claim; instead, the substantive allegations are deemed denied. Fla. Sm. Cl. R. 7.090(c); Ill. Sup. Ct. R. 286(a); Mass. Unif. Sm. Cl. R. 3(b); NYCCCA § 1803; Tex. Gov. Code § 28.033(b); RCW § 12.40.090.

In California, attorneys are barred from representing any parties, including corporations, in small claims courts. Ca. Code Civ. Pro. § 116.530. Washington law bars parties in small claims courts from appearing through counsel without the consent of the judicial officer hearing the case. RCW § 12.40.080. Other states grant corporations a dispensation from the general requirement that corporations appear through counsel in litigation. *See* Fla. Sm. Cl. R. 7.050(a)(2); Ill. Sup. Ct. R. 282(b); NYCCCA § 1809; Tex. Gov. Code § 28.003(e).

5, U.S. District Courts—Median Time Intervals From Filing to Disposition of Civil Cases (available at http://www.uscourts.gov/uscourts/Statistics/StatisticalTablesForTheFederalJudiciary/2010/dec10/C05Dec10.pdf) (last visited on October 14, 2011).

The federal district courts cannot resolve private TCPA litigation as efficiently as the small claims courts because more time is necessary for the parties to comply with the Federal Rules of Civil Procedure. For example, the Federal Rules allow for broad discovery "regarding any nonprivileged matter that is relevant to any party's claim or defense." Fed. R. Civ. P. 26(b), 30-37. The parties, however, may not commence discovery until they have had a planning conference under Federal Rule 26(f). Fed. R. Civ. P. 26(d). And the district court may stay discovery pending disposition of a defendant's motion to dismiss the complaint under Federal Rule 12(b). *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 558 (2007) ("a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed").

In putative class actions, the district court cannot hold the trial until the parties have taken discovery regarding, and briefed, whether the case meets the requirements for class certification under Rule 23. *See* Fed. R. Civ. P. 23(c)(1)(A); 1966 Federal Rules Advisory Committee Notes on Subdivision (c)(3) of Rule 23. A party may move the court for summary judgment under Federal Rule 56, which can further delay the ultimate resolution of the case. Class certification, broad discovery, and dispositive motions are simply unnecessary to resolve the limited issues presented by private TCPA claims. Given the complexity of the procedures available under the Federal Rules, it is no surprise that litigants needed 23 months to prepare federal cases for trial in 2010. *See* note 4 *supra*.

Moreover, the damages that can be recovered by private TCPA plaintiffs typically are within the jurisdiction of small claims courts. Statutory damages under the TCPA are $500 per violation, unless the defendant acted willfully or knowingly, in which case damages are increased to $1,500 per violation. § 227(b)(3). Thus, if a defendant made five phone calls that violated § 227(b)(1)(A)(iii), the plaintiff's damages would be limited to $2,500 or $7,500 — a range that is well within the jurisdictional limit of most small claims courts. *See* Ca. Code Civ. Pro. § 116.220(a)(1), § 116.221 (natural persons may sue in small claims courts to recover up to $7,500 in damages); Fla. Sm. Cl. R. 7.010(b) (plaintiffs may sue in small claims courts to recover up to $5,000 in damages); Ill. Sup. Ct. R. 281 (small claims include tort and contract claims for damages up to $10,000); M.G.L. c. 218 § 21 (small claims courts have jurisdiction over actions involving tort and contract claims for up to $7,000); NYCCCA § 1801 (small claims courts have jurisdiction of any cause of action for an amount not in excess of $5,000, exclusive of interest and costs); Tex. Gov. Code § 28.003(a) (small claims courts have jurisdiction over claims for damages up to $10,000); RCW § 12.40.010 (small claims courts have jurisdiction over claims for up to $5,000).

Because of the mistaken view that private actions under the TCPA fall within federal-question jurisdiction, some district courts have applied federal law to decide TCPA claims even though Congress intended for these claims to be governed by state law. For example, district courts have concluded that, as a matter of federal law, consumers have no duty to mitigate their damages under the TCPA by asking a defendant to stop calling them on a wireless phone. *Powell v. W. Asset Mgmt., Inc.*, 773 F. Supp. 2d 761,

764 (N.D. Ill. 2011); *Holtzman v. Turza*, No. 08 C 2014, 2010 WL 3076258, at *5 (N.D. Ill. Oct. 29, 2010); *Fillichio v. M.R.S Associates, Inc.*, No. 09–612629–CIV, 2010 WL 4261442, at *5 (S.D. Fla. Oct. 19, 2010). State law, however, "imposes a duty upon the injured party to exercise reasonable diligence and ordinary care in attempting to minimize the damages after injury has been inflicted." *Grothen v. Marshall Field & Co.*, 625 N.E.2d 343, 347 (Ill. App. 1993).

In addition, district courts have applied Federal Rule 23 to decide whether to certify private claims under the TCPA as class actions. *See, e.g., Mitchem v. Illinois Collection Serv., Inc.*, 271 F.R.D. 617, 620 (N.D. Ill. 2011). Finally, courts in the Sixth and Seventh Circuits have held that private TCPA claims are subject to the four-year, catch-all statute of limitations in 28 U.S.C. § 1658. *See Sawyer v. Atlas Heating & Sheet Metal Works, Inc.*, 642 F.3d 560, 561 (7th Cir. 2011); *Bridge v. Ocwen Fed. Bank*, 669 F. Supp. 2d 853, 859 (N.D. Ohio 2009). Applying federal law in these cases is at odds with Congress's decision to authorize private plaintiffs to sue only in state courts and only when "otherwise permitted by the laws or rules of court of a State." 47 U.S.C. § 227(b)(3).

By assigning jurisdiction over TCPA claims to state courts, Congress sought to ensure that private TCPA litigation would be conducted in accordance with the state law. But because of the erroneous conclusion that TCPA claims fall within § 1331's grant of jurisdiction, the federal courts are deciding private TCPA claims in accordance with Federal Rules of Civil Procedure, which increases the costs associated with private TCPA litigation and delays the resolution of these claims. The Eleventh Circuit's decision should be affirmed because it is consistent with Congress's

intent and it would eliminate the delays and increased costs associated with the litigation of private TCPA claims in the federal courts.

II. Private TCPA Actions Filed in Federal Court Have Mushroomed in Recent Years.

According to WebRecon, LLC, plaintiffs filed in federal court 28 private TCPA actions in 2009, 234 private TCPA actions in 2010, and 310 private TCPA actions in the first nine months of 2011 alone.[5] The number of TCPA filings increased a staggering 1,067% from 2009 to 2011. The dramatic growth in private TCPA litigation is a consequence of the increasing number of consumers who use wireless telephones to receive all or most of their calls. The Centers for Disease Control found that the percentage of households that had wireless phones but no landlines rose to 29.7% at the end of December 2010, up from 7.3% in 2005.[6] During the same period, the percentage of

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[5] *See* Collections Recon Press Release, *FDCPA and Other Consumer Lawsuit Statistics, December 16-31, 2010* (available at http://www.collectionsrecon.com/press-releases/fdcpa-and-other-consumer-lawsuit-statistics-december-16-31-2010/) (last visited on October 17, 2011); Collections Recon Press Release, *FDCPA and Other Consumer Lawsuit Statistics, September 16-30, 2011* (available at http://www.collectionsrecon.com/press-releases/fdcpa-and-other-consumer-lawsuit-statistics-september-16-30-2011/) (last visited on October 17, 2011).

[6] *Compare* Division of Health Interview Statistics, National Center for Health Statistics, Centers for Disease Control, *Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, July-December 2008*, Table 1, (available at http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless200905.pdf) (last visited on October 18, 2011) *with Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, July–December 2010*, Table 1 (available at http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201106.pdf) (last visited on October 18, 2011).

households that had a landline but lacked a wireless phone fell from 34.4% to 12.9%. *Id.* The percentage of adults who have landlines but who nonetheless receive all or nearly all calls on wireless phones ("wireless-mostly households") rose to 17.4% at the end of 2010. *See id.* at Table 3.

This trend helps to explain the increase in the number of private TCPA actions like this one, where a consumer claims that a debt collector violated the TCPA by using a predictive dialer to call a wireless telephone. As explained above, and for the reasons put forth by Respondent, Congress made clear its intent to avoid opening the doors of the federal courts to every person who alleges a violation of the TCPA. *Int'l Science,* 106 F.3d at 1157. The Eleventh Circuit's decision should therefore be affirmed.

CONCLUSION

For the reasons set forth above, the decision of the Eleventh Circuit should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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In The
Supreme Court of the United States

MARCUS D. MIMS,

Petitioner,

v.

ARROW FINANCIAL SERVICES, LLC,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF DBA INTERNATIONAL AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*

DBA International ("DBA") is a non-profit corporation based in Sacramento, California, founded in 1997 as a trade group for debt buyers – financial institutions that purchase uncollected accounts from originating lenders – and was formerly known as Debt Buyers Association.[1] Currently, DBA has over 500 professional debt buyer members, as well as 120 vendor and affiliate members. Formed to provide a forum for ethical and knowledgeable debt buyers, DBA maintains a strict Code of Ethics that requires compliance with a variety of federal and state laws, including the Telephone Consumer Protection Act ("TCPA" or "the Act"), 47 U.S.C. § 227.

DBA provides its members with networking and educational opportunities, as well as a forum to advance the interests of debt buyers before state and federal legislatures and agencies. DBA provides information to its members on legal matters, including the TCPA, through an annual convention, an executive conference, newsletters, educational webinars, teleconferences, and other media.

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae* or its counsel made a monetary contribution to the preparation or submission of this brief. Consent to the filing of this brief was filed on September 9, 2011.

Debt buying began more than forty-five years ago, but has become more widely practiced in the last decade as consumer credit originators sell increasing amounts of charged-off receivables. Upon purchasing a portfolio of charged-off receivables, a debt buyer, as assignee, takes subject to all of the rights, title and interest of the assignor to the indebtedness, as well as to any applicable defenses the debtor may have. Debt sales of accounts other than those originated by banks also have become as commonplace. Examples of charged-off receivables sold to debt buyers include accounts originated by credit card issuers, telecommunications providers, utility providers and retail merchants.

Hundreds, if not thousands, of entities purchase charged-off debt, including five publicly-traded companies, three of whom purchased a combined total of more than $77,000,000,000.00 of charged-off debt between the end of 1996 and the end of 2006. These publicly-traded debt buyers, as well as several large privately-owned companies, purchase many of the larger portfolios directly from the originators. There are also many smaller debt buyers that are active in the debt buying marketplace, who purchase a wide variety of portfolios and are active in trade organizations such as DBA. By purchasing uncollected accounts for less than the face value of the debt, debt buyers are able to settle these debts at a discount, thereby enabling consumers to improve their credit records, increase their access to credit and reduce the overall cost of credit for the benefit of all consumers.

Debt purchasing and collecting is a heavily-regulated industry, subject to a number of federal laws, including the TCPA.[2] DBA and its members have a vested and viable interest in the outcome of this matter as debt buyers hold title to millions of charged-off accounts that they attempt to collect through various means, including through the use of the telephone, which exposes them to potential TCPA liability. Determining the proper forum for TCPA actions directly and economically impacts the millions of accounts owned by debt buyers. The Court's decision will impact the future sale of accounts and efforts to collect those accounts, as the potential cost of defending against TCPA claims is taken into consideration as a factor in the price that can be paid. It is DBA's position that the proper forum for TCPA claims is in state court, with its attendant lower costs, "ease of use," and quicker path to resolution.

SUMMARY OF ARGUMENT

DBA writes separately to urge the Court to clarify an issue of vital importance to its members: namely, that private TCPA actions can be brought in state

[2] Other applicable laws include the (1) Fair Debt Collection Practices Act; (2) Fair Credit Reporting Act; (3) Fair and Accurate Credit Transaction Act of 2003; (4) Financial Privacy Rule and Gramm-Leach-Bliley Act; (5) Safeguard Rule; (6) Electronic Funds Transfer Act ("Reg. E."); and (7) Health Insurance Portability and Accountability Act.

court only. The TCPA was enacted to help fill the void created by the states' inability to regulate or prohibit unsolicited *interstate* telemarketing activities. The Act prohibits certain unsolicited telephone calls and facsimile transmissions, and restricts the use of automatic dialers and prerecorded messages to cellular telephones. In addition, Congress created a private right of action and provided for the recovery of "actual monetary loss" or a statutory penalty of $500, as well as injunctive relief.

Consistent with its goal of bridging the gap caused by the states' lack of jurisdiction to regulate interstate telecommunications activity, Congress vested jurisdiction over private TCPA actions in state courts to the extent "permitted by the laws or rules of court of a State." *See* 47 U.S.C. § 227(b)(3). This served Congress's desire to "make it as easy as possible for consumers to bring such actions [in state court], preferably in small claims courts."[3] Allowing such actions to proceed in federal court would completely undermine that objective and disserve consumers.

Equally important, allowing TCPA actions to be filed in federal court would be contrary to the interests of DBA and its members (and others) who must defend against private TCPA actions. Like consumers, defendants facing TCPA claims, where the likelihood of actual damages is low, have an interest in having a forum in which they can resolve such claims as

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[3] 137 Cong. Rec. 30,821 (1991).

quickly, efficiently and inexpensively as possible. State courts – especially small claims courts – provide that forum, and they are more widely accessible to consumers and defendants alike than federal courts. Allowing plaintiffs to file TCPA claims – involving what Congress found were "nuisance calls"[4] – in federal courts would convert the United States District Courts into small claims courts. This result would needlessly increase the costs for all involved (including the courts), which is completely at odds with the purpose of section 227(b)(3) of the TCPA.[5] Accordingly, DBA joins Respondent in urging the Court to affirm the decision of the Eleventh Circuit.

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[4] 47 U.S.C. § 227 note (Congressional findings) Sec. 2(6); *see also id.* at Sec. 2(10) (stating that evidence compiled by Congress "indicates that residential telephone subscribers consider automated or prerecorded telephone calls . . . to be a nuisance. . . ."); *id.* at Sec. 2(13) (stating that "the evidence presented to the Congress indicates that automated or prerecorded calls are a nuisance"); *id.* at Sec. 2(14) (noting that businesses "have complained . . . that automated or prerecorded telephone calls are a nuisance").

[5] Despite the fact that six out of seven circuits to have addressed the question have held that private TCPA claims may be brought only in state court, such lawsuits are often filed in federal court. When these cases are improperly filed in federal courts, defendants are needlessly forced to move to dismiss them, or the courts are required to do so *sua sponte*, wasting valuable and finite resources.

ARGUMENT

Congress Enacted The TCPA To Assist The States By Closing A Jurisdictional Loophole And Creating A Federal Right That Could Be Enforced In State Courts As The States Saw Fit

Finding that Americans were receiving more than 18 million unsolicited telemarketing calls every day, Congress passed the TCPA in 1991 to "protect the privacy interests of residential telephone subscribers by placing restrictions on unsolicited, automated telephone calls to the home and to facilitate interstate commerce by restricting certain uses of facsimile ([f]ax) machines and automatic dialers." S. Rep. No. 102-178, at 1 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1968; *see* 47 U.S.C. § 227(b)(1)(A-D) (setting forth prohibitions); 47 U.S.C. § 227 note (Congressional findings) Sec. 2(3). Although many states already had "statutes restricting various uses of the telephone for marketing," Congress was concerned that telemarketers could sidestep those restrictions "through interstate operations," *i.e.*, by calling consumers inside a state from outside the state's borders. 47 U.S.C. § 227 note (Congressional findings) Sec. 2(7). Congress therefore found that "[f]ederal law is needed to control residential telemarketing practices." *Id.*; *see also ErieNet, Inc. v. Velocity Net, Inc.*, 156 F.3d 513, 518 (3d Cir. 1998) ("Federal legislation was deemed necessary because telemarketers could avoid state legislation by engaging in interstate operations, *not because Congress recognized significant federal interest deserving of protection in federal courts.*"

(italics added)); *Chair King, Inc. v. Houston Cellular Corp.*, 131 F.3d 507, 513 (5th Cir. 1997) ("Congressional action was needed as states had no independent regulatory power over interstate telemarketing activities."); *International Science & Tech. Inst., Inc. v. Inacom Communications, Inc.*, 106 F.3d 1146, 1154 (4th Cir. 1996) ("[T]he dominant reason that Congress created a private TCPA action at all was out of solicitude for states which were thwarted in their attempts to stop unwanted telemarketing."). The Act provides various enforcement mechanisms, including allowing a private cause of action or a civil action brought on behalf of a state's residents by the state attorney general. *See* 47 U.S.C. § 227(b)(3) (private right of action); *id.* § 227(f)(1) (state attorney general actions).

Significantly, however, Congress carefully limited the fora in which the two types of actions could be brought: private actions may be brought only in state court if permitted by state law, while state attorneys general may proceed only in federal court. Thus the statute provides, "[a] person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State" an action for injunctive relief, "to recover for actual monetary loss" from the alleged violation or "$500 in damages," or both. *Id.* § 227(b)(3)(A-C).[6]

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[6] The court also has the discretion to "increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph." 47 U.S.C. § 227(b)(3).

A state attorney general, meanwhile, may file suit seeking similar relief when "any person has engaged or is engaging in a pattern or practice of telephone calls or other transmissions to residents of [a] State in violation of this section or the regulations prescribed under this section." *Id.* § 227(f)(1). In contrast to private actions, however, such actions may be brought only in federal court: "The district courts of the United States, the United States courts of any territory, and the District Court of the United States for the District of Columbia shall have exclusive jurisdiction over all civil actions brought under [§ 227(f)]." *Id.* § 227(f)(2). All circuits to have addressed the issue, save one, have held that a private TCPA cause of action may be brought *only* in state court.[7]

State Courts Are More Widely Available Than Federal Courts And Provide A Quicker, Less Expensive Forum For Resolution Of TCPA Claims, As Congress Intended

That Congress stepped in to protect consumers by creating a federal law to prevent certain interstate

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[7] *See Murphey v. Lanier*, 204 F.3d 911, 914-15 (9th Cir. 2000); *Foxhall Realty Law Offices, Inc. v. Telecommunications Premium Servs., Ltd.*, 156 F.3d 432, 434-35 (2d Cir. 1998); *ErieNet, Inc.*, 156 F.3d at 516-18; *Nicholson v. Hooters of Augusta, Inc.*, 136 F.3d 1287, 1289 (11th Cir. 1998); *Chair King, Inc.*, 131 F.3d at 510; *International Science & Tech. Inst., Inc.*, 106 F.3d at 1152-53; *but see Charvat v. Echostar Satellite, LLC*, 630 F.3d 459, 464 (6th Cir. 2010) (rejecting argument that private claims may proceed in state court only).

telemarketing activities does not mean that Congress wanted to burden the federal courts with the resulting litigation, or that Congress believed consumers would be best served by litigating TCPA claims in federal court. On the contrary, Congress "intended that private actions under 47 U.S.C. § 227(b)(3) be treated as small claims *best* resolved in state courts designed to handle them. . . ." *International Science & Tech. Institute, Inc.*, 106 F.3d at 1152. The circuit courts holding that jurisdiction over private TCPA claims lies only in state court have painstakingly examined the text of the statute, and considered the legislative history and purpose of the statute, in reaching this conclusion.

By directing private TCPA actions to state court, Congress sought to clear an easy and affordable path to recovery for those harmed by violations of the Act. For example, in California, there are fifty-eight superior (trial) courts, and the state court system has facilities in over 450 locations.[8] In contrast, the entire state of California has just four United States District Courts, with only fourteen locations spread across an enormous geographic region.[9]

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[8] *See* http://www.courts.ca.gov/2113.htm (accessed Oct. 15, 2011).

[9] *See* http://www.uscourts.gov/court_locator/CourtLocatorSearch.aspx (accessed Oct. 15, 2011) ("Location" selected = "California," and "Court Type" selected = "District Court").

In addition to providing many more locations for consumers to initiate an action, the cost of doing so is much lower in California state court. The filing fee for a small claims case seeking to recover for a single violation of the TCPA is only $30.00. *See* Cal. Code Civ. P. § 116.230(b)(1) (setting fee where amount demanded is $1,500.00 or less). To file an identical claim in the United States District Court for the Northern District of California costs over ten times as much – $350.00. *See* http://www.cand.uscourts.gov/courtfees (accessed Oct. 15, 2011).

Congress also hoped to ensure that plaintiffs could make their case themselves, without having to go to the trouble and expense of hiring an attorney, especially given that attorneys' fees could easily dwarf any recovery. The bill's sponsor, Senator Hollings, explained that the

> bill contains a private right-of-action provision that will *make it easier for consumers to recover damages* from receiving these computerized calls. That provision would allow consumers to bring an action in State court against any entity that violates the bill. The bill does not, because of constitutional constraints, dictate to the States which court in each State shall be the proper venue for such an action, as this is a matter for State legislators to determine. Nevertheless, it is my hope that States will *make it as easy as possible for consumers to bring such actions, preferably in small claims court*. . . .

> Small claims court or a similar court would *allow the consumer to appear before the court without an attorney*. The amount of damages in this legislation is set to be fair to both the consumer and the telemarketer. However, *it would defeat the purposes of the bill if the attorneys' costs to consumers of bringing an action were greater than the potential damages*. I thus expect that the States will act reasonably in permitting their citizens to go to court to enforce this bill.

137 Cong. Rec. S16205-06 (daily ed. Nov. 7, 1991) (statement of Sen. Hollings) (italics added).

Support for the conclusion that Congress wanted private TCPA actions heard in state court is found in Congress's findings regarding the sheer magnitude of the problem. It is unfathomable that Congress would open the doors to the federal courts to deal with upwards of eighteen million "nuisance" calls a day, particularly when the sponsor of the Act explicitly expressed his preference that disputes be resolved in small claims court. As the Fourth Circuit observed:

> [I]t is readily apparent that . . . Congress considered the effect that a newly created private right of action would have on judicial administration. Specifically finding that 18 million telemarketing calls are made daily . . . , Congress understandably avoided opening federal courts to the millions of potential private TCPA claims by authorizing private actions only in state courts, presumably in the small claims courts. Similarly concerned

> over the potential impact of private actions on the administration of state courts, Congress included a provision to allow the states to prohibit private TCPA actions in their courts. We have no doubt that Congress has a legitimate interest in not overburdening state and federal courts. Nor can it be doubted that Congress has a legitimate interest in respecting the states' judgments about when their courts are overburdened. With those interests in mind and recognizing that other enforcement mechanisms are available in the TCPA, we believe Congress acted rationally in both closing federal courts and allowing states to close theirs to the millions of private actions that could be filed if only a small portion of each year's 6.57 billion telemarketing transmissions were illegal under the TCPA.

International Science & Tech. Institute, Inc., 106 F.3d at 1157.

Beyond easing the way for consumers' claims and sheltering the federal courts from a deluge of TCPA lawsuits, defendants also benefit from avoiding the complexity and expense of federal court litigation. Like consumers, they do not need to hire an attorney in small claims court – and in some cases, cannot be represented by an attorney. *See, e.g.*, Cal. Code Civ. P. §§ 116.530 (prohibiting attorneys from partaking "in the conduct or defense of a small claims action"); 116.540 (permitting corporations and other entities to "appear and participate in a small claims action only

through a regular employee," or an officer or director who is not employed solely for the purpose of appearing in small claims court). Discovery often is not allowed in state court proceedings. *See id.* § 116.310(b). Cases brought in small claims court are brought to hearing much sooner than a typical federal-court lawsuit. *See id.* § 116.330 (requiring case to be scheduled for hearing within twenty to seventy days after filing of claim).[10] Cases are heard and decisions are rendered informally and promptly. *See id.* §§ 116.510 ("The hearing and disposition of the small claims action shall be informal, the object being to dispense justice promptly, fairly, and inexpensively."); 116.520 (permitting court to "consult witnesses informally and otherwise investigate the controversy with or without notice to the parties"). The right to appeal decisions rendered in small claims court is often limited. *See id.* § 116.710(a) ("The plaintiff in a small claims action shall have no right to appeal the judgment on the plaintiff's claim. . . ."). These procedures can be of substantial benefit to both plaintiffs and defendants.[11]

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[10] In contrast, during the year-long period ending March 31, 2010, the median time to resolve a civil case in all of the United States District Courts was 8.2 months. *See* http://www.uscourts.gov/uscourts/Statistics/FederalJudicialCaseloadStatistics/2010/tables/C05Mar10.pdf (accessed Oct. 17, 2011).

[11] Although Senator Hollings spoke of consumers' interests in avoiding having to pay an attorney, DBA's members also have an interest in being able to defend TCPA claims without an attorney. Not only does this keep the costs of defense down, it avoids placing defendants in the undesirable position of having to spend more to defend an action than the plaintiff might

(Continued on following page)

In addition to small claims court, states often have a multi-tiered trial court system, where jurisdiction is based on the amount at issue and procedures are streamlined accordingly. Again using California as an example, a case where the amount in controversy "does not exceed twenty five-thousand dollars ($25,000)" is "treated as a limited civil case." Cal. Code Civ. P. § 85; *see id.* § 86. In such cases, the types of pleadings are limited, as is motion practice and discovery. *See id.* § 92 (pleadings, motions), § 94 (discovery). Direct testimony may be offered by affidavit or declaration. *See id.* § 98. As with small claims court, the streamlined procedures available in limited civil cases benefit both plaintiffs and defendants.

The Court Should Hold That TCPA Claims Cannot Be Filed In, Or Removed To, Federal Courts Pursuant To 28 U.S.C. §§ 1332 Or 1441

In support of the argument that "[n]othing in the TCPA expressly divests federal courts of federal-question jurisdiction," Petitioner points to "the so-far unanimous agreement of the courts of appeals that the district courts may exercise *diversity* jurisdiction over TCPA claims under 28 U.S.C. § 1332." Pet. Br. at 34. DBA respectfully submits that because Congress clearly intended that private TCPA claims be brought in state court only, the Court should hold that all such claims can be heard only in state court, regardless

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ultimately recover, *i.e.*, from having to choose between defending a non-meritorious case or offering a "cost of defense" settlement.

whether diversity jurisdiction might otherwise exist or whether removal might be proper under 28 U.S.C. § 1441. To hold otherwise would be to permit an end-run around section 227(b)(3) of the TCPA, and would deprive state courts of the right to determine whether and to what extent to permit TCPA actions in their courts.

In *Landsman & Funk PC v. Skinder-Strauss Assocs.*, 640 F.3d 72 (3d Cir.), *reh'g en banc granted*, 650 F.3d 311 (2011), Judge Garth dissented from the court's holding that section 227(b)(3) did not divest federal courts of diversity jurisdiction over private TCPA claims. *See* 640 F.3d at 101. Emphasizing his view that the court's earlier decision in *ErieNet* had resolved the issue and that the court was bound by that decision, *see id.* at 102-03, Judge Garth cogently and persuasively explained why federal courts lacked jurisdiction to hear any private TCPA claims, regardless of the statutory basis for jurisdiction, *see id.* at 103-08. DBA urges the Court to hold that section 227(b)(3) vested jurisdiction to hear *all* private TCPA claims in state court, for the reasons stated by Judge Garth.

In closing, allowing private TCPA actions to proceed in federal court will deprive the parties – plaintiffs *and* defendants – of the benefits that Congress sought to provide when it directed that these actions be filed in state court. Doing so would also have a significant financial impact on DBA's members, by

requiring them to incur attorneys' fees whenever they choose to defend a TCPA claim.[12] In order to avoid an onslaught of lawsuits that would effectively turn the federal courts into small claims courts, DBA respectfully urges the Court to clarify that a private action under the TCPA may be heard only in state court.

CONCLUSION

For all of the foregoing reasons, DBA respectfully submits that the decision of the Eleventh Circuit should be affirmed.

Dated: October 27, 2011

Respectfully submitted,

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[12] Consumers, also, "would likely retain counsel if the cause of action were to be pursued in Federal court." *Landsman & Funk PC*, 640 F.3d at 106 (Garth, J., dissenting).

AMICUS CURIAE BRIEF

No. 10-1195

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On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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INTEREST OF *AMICUS CURIAE*[1]

The National Federation of Independent Business Small Business Legal Center (NFIB Legal Center) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. Founded in 1943, NFIB is the nation's oldest and largest nonprofit, nonpartisan organization dedicated to representing the interests of small business owners in all 50 states and Washington, D.C. NFIB has 350,000 members that own and operate independent businesses spanning every industry sector. The typical NFIB member business has 10 employees and gross annual sales of approximately $500,000. NFIB members reflect American small business.

NFIB Legal Center has a strong interest in this case because small businesses consistently incur unreasonable and unintended expenses fighting small-dollar Telephone Consumer Protection Act (TCPA) claims in federal courts. State small-claims courts are best equipped to resolve small-dollar suits fairly, informally, and cheaply. Knowing this, Congress made filing in state court an explicit requirement of any private action to enforce the TCPA. Petitioner, like many other TCPA plaintiffs, attempted to bypass

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[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No one other than *amicus curiae*, its members, or *amicus*'s counsel made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court.

this express limitation—and defy Congress's intent—by filing his private TCPA claims in federal court. Allowing such federal-court actions to be implied in the TCPA would have severe financial consequences for many small business defendants.

INTRODUCTION

Enacted in 1991, the TCPA creates a private right of action to complement existing state-law prohibitions on abusive telemarketing. Congress, acting at the states' request, adopted this distinct federal statute because state laws could not adequately deter *inter*state telemarketing misconduct. Consistent with its intent to help the states' enforcement efforts, Congress instructed that private TCPA suits should proceed in state courts, and only "if otherwise permitted by the laws or rules of court of a State . . . ." 47 U.S.C. § 227(b)(3). In essence, section 227(b)(3) creates, if a state so chooses, a private cause of action in state court governed by the parameters set forth by Congress.

The TCPA's private right of action has spurred disagreement among the courts of appeals regarding whether private TCPA claims may proceed in federal court. Six circuits have concluded that there is no federal-question jurisdiction over private TCPA claims. *See* Resp. Br. in Opp'n Cert. 4. Two circuits have reached the opposite conclusion. *See id.* at 5. Four circuits have held that federal courts may exercise diversity jurisdiction over private TCPA claims. *See id.* at 6; *see also Charvat v. NMP, LLC*, __ F.3d __, No. 10-3390, 2011 WL 3805618, at *5 (6th Cir. Aug. 30, 2011). And one circuit has held that federal courts may exercise supplemental jurisdiction over private TCPA claims. *See Landsman & Funk*

PC v. Skinder-Strauss Assocs., 640 F.3d 72, 88–89 (3d Cir. 2011).

Amicus agrees with Respondent that the majority approach—and the conclusion reached by the Eleventh Circuit in this case—is correct, because it honors Congress's intent to limit private TCPA claims to state courts. The distinctive state-law focused language of section 227(b)(3), naturally read, confines claims arising under the statute to state courts. *See* Resp. Br. 12–27. The availability of a federal forum would inflict undue costs and unnecessary burdens on TCPA defendants—and small businesses in particular—who must retain outside counsel to defend these simple, small-dollar claims under the Federal Rules of Civil Procedure.

But even were Petitioner correct that section 227(b)(3) does not strip federal courts of general federal-question jurisdiction under 28 U.S.C. § 1331, this Court should affirm the decision below on the alternative ground that Petitioner failed to state a claim upon which relief can be granted because he filed his private TCPA claims in federal court. By its unique terms, section 227(b)(3) creates a private right of action that does not exist outside of a permissive state's courts. And, because of the carefully-tailored way in which Congress framed this cause of action, the Court does not have to decide whether section 227(b)(3)'s state-court requirement is a jurisdictional provision or a substantive limitation on the cause of action itself; these inquiries coalesce. Thus, even if Congress did not eliminate the availability of federal-question jurisdiction by assigning jurisdiction to state courts, the TCPA's express terms require the dismissal of Petitioner's claims because he improperly filed them in federal court.

ARGUMENT

I. DEFENDING SMALL-DOLLAR TCPA CLAIMS IN FEDERAL COURT IMPOSES UNDUE AND UNINTENDED BURDENS ON SMALL BUSINESSES

Small businesses shoulder a disproportionate burden of tort liability in the United States: although they generate only 22 percent of total business revenue, small businesses pay 81 percent of tort liability costs. *See* U.S. CHAMBER INSTITUTE FOR LEGAL REFORM, TORT LIABILITY COSTS FOR SMALL BUSINESSES, at 9 (2010) ("TORT LIABILITY COSTS"); *see also* Testimony of Elizabeth Milito, Senior Executive Counsel, NFIB Small Business Legal Center, H.R. 966, Lawsuit Abuse Reduction Act, House of Representatives Committee on the Judiciary, Subcommittee on the Constitution, Serial No. 112-18 (March 11, 2011), *available at* http://judiciary.house.gov/hearings/printers/112th/11218_65079.PDF (last visited October 28, 2011). Nearly half of small businesses are involved annually in a legal dispute requiring counsel. *See* WILLIAM J. DENNIS, JR., NATIONAL FEDERATION OF INDEPENDENT BUSINESS, NATIONAL SMALL BUSINESS POLL: THE USE OF LAWYERS, at 11 (2005).

Lawsuits are a significant concern for small-business owners. Small businesses pay $35.6 billion annually, out of pocket, to resolve claims against them. *See* TORT LIABILITY COSTS, *supra*, at 9. While big-dollar damages awards capture headlines and fuel debate over tort reform, it is small-dollar suits, such as private TCPA actions, that small businesses face most often. No single TCPA claim will bankrupt a small business. But in the aggregate, private TCPA claims can be pernicious and expensive—particularly

in federal court—threatening small businesses with death by a thousand cuts. Unlike large companies, small businesses cannot easily pass on the costs of litigation and settlement to their customers and remain competitive in a tough marketplace. Because many small businesses operate at the margin, even modest savings can mean the difference between solvency and bankruptcy.

Many business defendants prefer to litigate in federal, not state, court. *See* 5 MICHAEL J. WEAVER & ROBERT G. KNAIER, BUS. & COM. LITIG. FED. CTS. § 54:2 (Am. Bar Ass'n, 2d ed. 2010) (noting that "many of us far prefer to litigate within the federal court system"). At least for small businesses, however, state fora are preferable for TCPA claims because litigating small-dollar claims in federal court takes longer, and ultimately costs more, than state small-claims actions.

Congress was acutely aware of these realities when it enacted section 227(b)(3), and Congress accordingly expected that TCPA plaintiffs would seek relief in state small-claims court. Senator Hollings, who sponsored the TCPA, expressed "hope that States will make it as easy as possible for consumers to bring such actions, preferably in small claims court. . . . Small claims court or a similar court would allow the consumer to appear before the court without an attorney." 137 Cong. Rec. 30,821 (1991). As Senator Hollings explained: "The amount of damages in this legislation is set to be fair to both the consumer and the telemarketer. However, *it would defeat the purposes of the bill if the attorneys' costs to consumers of bringing an action were greater than the potential damages.*" *Id.* (emphasis added).

State small-claims courts resolve disputes more quickly than even the most efficient federal courts. For example, trial in Florida small-claims court—where Petitioner should have filed his TCPA claims—ordinarily must occur within 110 days of the filing of the complaint. FLA. SMALL CLAIMS R. 7.090(b), (d). In California, small-claims trials typically proceed within 20 to 70 days of filing. CAL. CIV. PROC. CODE § 116.330(a). In Illinois, trial takes place between 14 and 40 days after issuance of the summons. ILL. S. CT. R. 283.

Federal courts, by contrast, are not designed for speedy resolution of small-dollar claims. On average, federal district courts take roughly 9.3 months to dispose of ordinary civil cases, and 23.3 months if the case goes to trial. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS MARCH 31, 2010, Table C-5, "U.S. District Courts—Median Time Intervals From Filing to Disposition of Civil Cases Terminated, by District and Method of Disposition, During the 12-Month Period Ending March 31, 2010," *available at* http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2010/tables/C05Mar10.pdf (last visited October 28, 2011). These delays adversely affect a small business's bottom line. The longer a legal dispute goes unresolved, the more time, money, and energy it must devote to small-stakes litigation, at the expense of serving its customers, employees, and other stakeholders.

State small-claims proceedings also cost litigants less money than federal litigation. By design, small-claims proceedings are informal, speedy, and inexpensive. States thus require the resolution of such claims to be free of technical or complicated

procedures such that a layperson can navigate the system.[2] *See generally* F. P. Renner, Annotation, *Statutory or Constitutional Provisions Relating to Participation by Attorney or Representative in Small Claims Court*, 167 A.L.R. 827 (1947) ("The purpose of these courts is to provide a speedy hearing at low cost to the litigants . . . ."). Parties typically do not appear with counsel and, in many jurisdictions, by law *cannot* have an attorney present. *See id.*; *see also* James C. Turner & Joyce A. McGee, *Small Claims Reform: A Means of Expanding Access to the American Civil Justice System*, 5 UDC/DCSL L. REV. 177, 180–81 (2000) (noting that at least 10 states either outright prohibit or severely limit appearances by counsel).

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[2] *See, e.g.*, ARIZ. REV. STAT. ANN. § 22-501 ("'[S]mall claims division' means a forum in justice courts in which procedures shall allow the inexpensive, speedy and informal resolution of small claims."); CAL. CIV. PROC. CODE § 116.510 ("The hearing and disposition of the small claims action shall be informal, the object being to dispense justice promptly, fairly, and inexpensively."); IND. SMALL CLAIMS R. 8(A) ("The trial shall be informal, with the sole objective of dispensing speedy justice between the parties according to the rules of substantive law, and shall not be bound by the statutory provisions or rules of practice, procedure, pleadings or evidence except provisions relating to privileged communications and offers of compromise."); KY. REV. STAT. ANN. § 24A.200 (small-claims court intended "to provide an efficient and inexpensive forum with the objective of dispensing justice in a speedy manner" and "to simplify practice and procedure in the commencement, handling, and trial of such cases in order that plaintiffs may bring actions in their own behalf, and defendants may participate actively in the proceedings rather than default"); ME. R. SMALL CLAIMS P. 1 (small-claims rules "shall be construed to secure the just, speedy, and inexpensive determination of every action in a simple and informal way"); MASS. GEN. LAWS ANN. ch. 218, § 21 (small-claims proceedings should be "simple, informal and inexpen-

In federal court, however, proceedings are governed by the rigors of the Federal Rules of Civil Procedure, and parties are ill-advised to represent themselves. Accordingly, small business defendants facing private TCPA claims in federal court likely would incur substantial counsel fees—greatly increasing the costs of litigation—notwithstanding Congress's aim of quick and efficient resolution. Moreover, because the statute contains no fee-shifting provision, small businesses are unable to recover counsel fees under the TCPA even in cases involving frivolous claims.

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sive"); NEV. JUSTICE CT. R. CIV. P. 96 ("No formal pleading other than the claim and notice shall be necessary, and the trials and dispositions of all such actions shall be informal, with the sole object of dispensing fair and speedy justice between the parties."); OKLA. ST. ANN. tit. 12, § 1761 ("The hearing and disposition of such actions shall be informal with the sole object of dispensing speedy justice between the parties."); VT. STAT. ANN. tit. 12, § 5531(a) (small-claims proceedings must be "simple, informal, and inexpensive"); WASH. REV. CODE ANN. § 12.40.090 ("The hearing and disposition of the actions shall be informal, with the sole object of dispensing speedy and quick justice between the litigants."); *see also Cleveland Bar Ass'n v. Pearlman*, 832 N.E.2d 1193, 1196 (Ohio 2005) ("Thus, by design, proceedings in small claims courts are informal and geared to allowing individuals to resolve uncomplicated disputes quickly and inexpensively."); *Henriksen v. Gleason*, 643 N.W.2d 652, 656 (Neb. 2002) ("Proceedings in small claims courts are conducted on a very informal basis, with a minimum of procedural requirements."); *Isaac v. Truck Serv., Inc.*, 752 A.2d 509, 515 (Conn. 2000) ("Our small claims system is statutorily designed to achieve the inexpensive, prompt, informal and final adjudication of contested monetary claims involving limited amounts of money." (citing CONN. GEN. STAT. ANN. § 51-15)); *Lau v. City of Oelwein*, 336 N.W.2d 202, 203 (Iowa 1983) ("[T]he legislature intended to provide a simple, informal, and inexpensive procedure for the trial of a small claim in a trial conducted by the court itself without regard to technicalities of procedure.").

As a result, the mere *availability* of a federal forum for private TCPA claims shifts the strategic calculus for small-business defendants. A small business might well settle an otherwise frivolous claim simply because the cost of hiring a lawyer and vigorously defending itself in federal court would quickly eclipse the alleged damages. Indeed, most TCPA defendants can avoid liability only by proving one of several fact-intensive affirmative defenses, including, *inter alia*, that they had "the prior express consent of the called party," 47 U.S.C. § 227(b)(1)(A); made the call "for emergency purposes," *id.*; or had "an established business relationship with the recipient," *id.* § 227(b)(1)(C)(i).

Savvy plaintiffs or their attorneys can exploit this strategic advantage to leverage unwarranted settlements. NFIB's members are especially susceptible targets for such tactics because small businesses often lack in-house counsel that could efficiently assess a claim's viability. Assuming a modest hourly rate of $200 per hour to retain outside counsel, it would take less than three hours of legal fees to make settlement of a $500 TCPA claim the prudent choice.

The fact that individual plaintiffs can seek presumptive, statutory damages in state small-claims tribunals also obviates the need for costly class-action relief. *See, e.g.*, *Local Banking Prods., Inc. v. Kosher Bagel Munch, Inc.*, 23 A.3d 469, 476–77 (N.J. Super. Ct. App. Div. 2011) ("The combination of the TCPA's design and New Jersey's procedures suggests that the benefit of a class action has been conferred on a litigant by the very nature of the procedures employed and relief obtained. The cost of litigating for an individual is significantly less than the potential recovery."); *Rudgayzer & Gratt v. LRS Comms., Inc.*,

789 N.Y.S.2d 601, 603 (N.Y. App. Term 2004) ("[T]he language of the TCPA . . ., in combination with the provisions of CPLR 901(b), makes it clear that no TCPA class action is available in the New York State courts. . . . CPLR 901(b) bars a class action to recover a statutory penalty, such as that provided for by the TCPA, unless the statute providing for the penalty specifically authorizes such a class action."); *accord Weber v. U.S. Sterling Secs., Inc.*, 924 A.2d 816, 827 (Conn. 2007).

By removing the prospect of full-bore federal litigation, Congress struck a careful balance between the interests of claimants and defendants. Defendants, especially small businesses, are less likely to pay out undeserved settlements when they can afford to contest these cases in state small-claims court, as Congress intended. These practical realities are consistent with Congress's general view that federal courts are not appropriate fora to resolve small-dollar state-law disputes. *Cf.* 28 U.S.C. § 1332(a) ($75,000 amount-in-controversy requirement). More importantly, these realities affirm Congress's careful determination that private TCPA claims have no place in federal court.

II. CONGRESS'S EXPRESS LIMITATION ON THE TCPA PRIVATE RIGHT OF ACTION REQUIRES AFFIRMANCE

The court below dismissed Petitioner's TCPA claims under Rule 12(b)(1) based on a lack of subject-matter jurisdiction. For the reasons stated by Respondent, that holding is correct. But even if this Court concluded that section 227(b)(3)'s assignment of claims to state courts does not cabin federal courts' federal-question jurisdiction under 28 U.S.C. § 1331, the

Court nevertheless should affirm the dismissal of Petitioner's claims under Rule 12(b)(6) because Congress expressly limited the availability of the cause of action to the courts of a state that "otherwise permit[s]" such actions. *See, e.g.*, *Morrison v. Nat'l Australia Bank Ltd.*, 130 S. Ct. 2869, 2877 (2010) (affirming on Rule 12(b)(6) grounds, rather than remanding for the lower court to put "a new Rule 12(b)(6) label [on] the same Rule 12(b)(1) conclusion").

Section 227(b)(3) is unique in that its substantive and jurisdictional limits coequally constrain the scope of the private right of action—making it unnecessary to tease out the substantive from the jurisdictional. Thus, were the Court to view the limits set forth in section 227(b)(3) as substantive rather than jurisdictional, Petitioner's claims still fail on the merits because he improperly filed them in federal court. Section 227(b)(3)'s limitation on "where" a plaintiff can file a private TCPA claim would be no less "important and mandatory" if viewed as a substantive limitation, rather than a jurisdictional one. *Henderson v. Shinseki*, 131 S. Ct. 1197, 1203 (2011). And, as in *Morrison*, because Petitioner's federal-court TCPA action obviously fails to state a claim for relief, there is no reason for this Court to remand for further proceedings.

CONCLUSION

The Court should affirm the decision below.

Respectfully submitted,

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